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S. HRG. 105-997

# RELIGIOUS LIBERTY PROTECTION ACT OF 1998

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTH CONGRESS**  
SECOND SESSION

ON

**S. 2148**

A BILL TO PROTECT RELIGIOUS LIBERTY

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JUNE 23, 1998

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**Serial No. J-105-110**

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# **S. 2148—RELIGIOUS LIBERTY PROTECTION ACT OF 1998**

**TUESDAY, JUNE 23, 1998**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The committee met, pursuant to notice, at 9:42 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, DeWine, Sessions, Kennedy, Feingold, and Durbin.

## **OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH**

The CHAIRMAN. I apologize for being just a little bit late, but I had a series of meetings in my office since 7:00 a.m. this morning and I just couldn't get finished with the last one and it was important. But I apologize to my colleagues and I appreciate having you all here this morning.

I welcome all of you to these hearings on S. 2148, the Religious Liberty Protection Act of 1998. This legislation seeks to protect the right of religious freedom in cooperation with the Supreme Court. We have reached this point through a dialog with the Court about the appropriate method of protecting the rights guaranteed by the Free Exercise Clause of the Constitution. Clearly, it would be preferable if the Court returned to its previous solicitude for religious liberty claims, but until it does, this Congress will do what it can to protect religious freedom in cooperation with the Supreme Court.

Indeed, it seems odd that we would need legislation at all to protect the first freedom guaranteed by the Bill of Rights. But faced with this second-best situation, we must do our best to ensure that in America, priests and confessors need not fear that the sanctity of the confessional will be violated to help a plaintiff or a prosecutor win their case; to ensure that, in America, Bible study will not be zoned out of believers' own homes, and their places of worship not zoned out of their neighborhoods; to ensure that the Founders free exercise guarantee will at least mean that the government will have a good reason before it outlaws or punishes any religious practice.

This legislation works to protect religious freedom in two ways. First, the Religious Liberty Protection Act builds on the Religious Freedom Restoration Act, which continues to be valid as a matter of Federal authority or Federal statutory law after *City of Boerne*

v. *Flores*, by extending RFRA's rule of protection to the full extent of Congress' statutory authority.

The Religious Liberty Protection Act establishes the rule of strict scrutiny review for rules that burden religious practice in interstate commerce or in federally funded programs. In areas where Congress has plenary authority to legislate, religious practice cannot be substantially burdened except for the most compelling reasons as a matter of Federal statutory right.

Second, in addition to this Federal substantive right, the Religious Liberty Protection Act seeks to assist the courts in enforcing the Free Exercise Clause of the Constitution by enacting enforcement measures under the 14th Amendment in the manner suggested by the Court in *Boerne*.

Under this legislation, when a claimant shows a violation of his or her constitutional rights as interpreted by the courts, the burden of proof will shift to the government to disprove the violation. In this manner, violations of constitutional rights that might otherwise go unredressed can more readily be remedied. This procedural support for under-enforced constitutional rights is consistent with other civil rights laws.

Additionally, the *Boerne* Court suggested that where Congress found a serious or a widespread problem, it could enact stronger rules to remedy the situation. We have found such a problem in the land use context, as will be explained today and as our colleagues in the House have also heard. Too often, local zoning and landmarking rules work to the disadvantage of religion generally, and minority religions in particular.

To deal with the specific problem in this area, the Religious Liberty Protection Act establishes special rules for land use cases. Together, these enforcement mechanisms will help protect the free exercise rights guaranteed by the Constitution with the appropriate congruence and proportionality to the problem required by *Boerne*.

These protections are necessary not because there are systematic pogroms against certain sects now as there had been earlier in our history. No. Hostility to religious freedom comes more subtly from the blind, bureaucratic behemoth of the regulatory state. As it imposes its arbitrary rules into every corner of our lives, it seems unable somehow to cope with the infinity variety of religious experience in America.

Rule-bound, and often over-cautious to avoiding aiding religion, government clings to its creed that, "rules are rules," no matter the damage done to the individual soul. So perhaps certain religious sects are no longer driven from State to State and their extermination is no longer an explicit State policy, like we have witnessed in our own history, but they are still told they cannot build their temples in certain towns.

This morning, we will hear from a small cross-section of the exceptionally broad range of religious and civil liberties groups that see a need for Federal legislation protecting religious liberty, and we will have a lively debate about the constitutional merits of the legislation with some of the leading constitutional authorities or leaders in the field. I look forward to these various discussions.

The freedom to practice one's religion is the most fundamental of rights, and the discussion we are having about protecting that

right is one we need to have here in Congress and across the Nation, and we begin this battle again.

In that regard, I am very happy to turn to my dear friend and colleague, Senator Kennedy, who was such a leader in the Religious Freedom Restoration Act fights and who has agreed to co-sponsor this bill, and I am personally very appreciative of it.

Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Well, thank you very much, Mr. Chairman. I want to express my appreciation to you for holding these hearings and for the leadership that you have provided on this matter for a very considerable time. I am very hopeful that we can work closely together to achieve our objective.

This issue is of great importance to many of our fellow citizens who find themselves denied a fundamental right in our democracy, the free exercise of their religion. The Supreme Court in 1990, in *Oregon v. Smith*, dealt a serious setback to the First Amendment. Before that decision, under long-established constitutional law, action by Federal, State or local governments that interfered with a citizen's ability to practice religion was prohibited unless the restriction met a strict two-part test; first, that it was necessary to achieve a compelling governmental interest, and, second, that there was no less burdensome way to accomplish the goal.

The compelling interest test had been the prevailing legal standard protecting the free exercise of religion for nearly 30 years, and the standard had worked well. Yet, the Court in the *Smith* case saw fit to overrule that test. Essentially, the Court said individuals are free to believe in their religion, but they don't necessarily have the right to exercise it.

In the years after the *Smith* decision, before the passage of the Religious Freedom Restoration Act in 1993, we often saw restrictions imposed by State and Federal laws on individuals' rights to free exercise of religion. Churches were zoned out of commercial areas. Those of the Jewish faith were subjected to autopsies, in violation of their beliefs. Jehovah's Witnesses were denied employment after refusing to take loyalty oaths. The Amish were asked to place orange reflective tape on their carriages, contrary to their religious beliefs.

The Religious Freedom Restoration Act was passed by Congress and signed by President Clinton in 1993 to end such practices, restore the strict scrutiny test, and achieve a fairer balance between free exercise rights of individuals and the interests of the government. We were disappointed when the Supreme Court ruled last year in *City of Boerne v. Flores* that the 1993 Act was unconstitutional.

Earlier this month, Senator Hatch and I introduced new legislation we believe will provide substantial protection to religious liberty and which will meet the Supreme Court's requirements. The Religious Liberty Protection Act will restore the general rule that State or local officials may not substantially burden the free exercise of religion. It extends the compelling government interest test to any religious practice that is in, or affects commerce, or any

State or local program that receives Federal funding. The bill also addresses the problem of land use regulations that unfairly burden religious freedom.

Like the Religious Freedom Restoration Act, our new bill does not dictate a particular outcome. In some cases, plaintiffs will win. In others, they will lose. In many cases, a lawsuit will never be filed, and the Religious Liberty Protection Act will simply serve as a guidepost for negotiations between individuals and their local and State representatives.

We believe this bill is well within Congress' legislative authority. It rests on Congress' power under the Commerce and Spending Clauses, as well as our authority to enact remedial legislation pursuant to the 14th Amendment and in accordance with the Supreme Court's decision in *City of Boerne v. Flores*.

Congress must do the necessary fact-finding to support this legislation. I am confident that today's hearing will help to lay a solid and irrefutable record in support of this needed legislation, and I look forward to the testimony of today's witnesses.

I thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Kennedy. I appreciate your fine statement.

Our first witness will be Elder Dallin H. Oaks. Since 1984, Elder has been a member of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, certainly one of the highest positions in that church. In addition to his church service, Elder Oaks has had an extensive legal career, and so in both capacities we are calling upon him this morning.

He served as a law clerk to Chief Justice Earl Warren, practiced law with the Chicago firm of Kirkland and Ellis, was a law professor at the University of Chicago, was Executive Director of the American Bar Foundation, and served as an Associate Justice on the Utah Supreme Court. I think it is safe to say that had he not accepted this religious call, he would have had an excellent chance to have been on the Supreme Court of the United States of America. Take it from me. [Laughter.]

I am not exaggerating. This is a great man. He also served as President of Brigham Young University, the Nation's largest private university. He is the author of 9 books and over 100 articles on the subjects of religion and law.

So we are happy to have you here, Elder Oaks, and we look forward to hearing your testimony.

After Elder Oaks, we will hear from Dr. Richard Land, himself a person of great fame and notoriety. Dr. Land is the President and Chief Executive Officer of the Ethics and Religious Liberty Commission of the Southern Baptist Convention. He is an ordained Southern Baptist minister and has pastored churches in Texas, Louisiana, and England. Dr. Land was Vice President for Academic Affairs at Criswell College, where he also taught theology. Additionally, he served as the senior adviser to former Texas Governor William P. Clements on church and State issues. He has authored numerous articles and has contributed to several books dealing with religious issues.

We are very happy to welcome you, Dr. Land. We appreciate your taking time.

We will then hear from Rabbi David Zwiebel, who is the Director of Government Affairs and General Counsel for Agudath Israel of America, the Nation's largest grass roots Orthodox Jewish movement. His areas of expertise include religious freedom, church-State relations, civil rights, private education, and medical ethics. He has authored numerous amicus curiae briefs in the Supreme Court and other Federal and State courts across the Nation. Dr. Zwiebel has published widely in the fields of religion, law, and public policy.

We really appreciate your coming once again to be with the committee.

Our final witness for panel one will be Mr. Elliot Minberg. Mr. Minberg serves as Vice President and Legal Director for People for the American Way, a non-partisan citizens organization with over 300,000 members vitally concerned with promoting and protecting religious liberty. In his current capacity, he supervises nationwide public interest litigation and advocacy activity focusing on constitutional and civil rights issues. He also serves on several advisory committees, including Americans United for the Separation of Church and State.

As you can see, we have with our four-member panel a wide variety of views, a wide variety of experience, all of whom have been excellent in their respective fields of endeavor, and we are just personally very happy to have all of you here.

We will begin with you, Elder Oaks, and then we will go right across the table.

Senator KENNEDY. Mr. Chairman, could I ask consent that Senator Leahy's statement be placed in the record?

The CHAIRMAN. Without objection, we will put Senator Leahy's statement in the record at the appropriate place.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Mr. Chairman, the right to practice any religion of our choice—or no religion at all—is one of the cornerstones of our Constitutional liberties, protected by the Free Exercise Clause of the First Amendment.

No law or ordinance that denies or restricts that right should be tolerated. That is why I sponsored the Religious Freedom Restoration Act ("RFRA") and supported its passage. That is why I continue to support the goal of the Religious Liberty Protection Act ("RLPA") to protect our right to the free exercise of religion without interference from such laws.

Last year, the Supreme Court ruled in *Boerne v. Flores*, 117 S. Ct. 2157 (1977), that the Religious Freedom Restoration Act is unconstitutional because the statute applies a strict standard of judicial review to otherwise neutral, generally applicable laws. The Supreme Court in *Boerne* held that courts should subject such laws to a rational basis test—not a strict scrutiny standard. The Court based its ruling on its prior precedent on this issue, *Oregon v. Smith*, 492 U.S. 872 (1990), and on what the Court viewed as a weak legislative record which lacked sufficient evidence of hostility toward or pervasive discrimination against religious practice to justify the RFRA's broad reach.

As drafted, the RLPA would subject laws, including neutral, generally applicable laws, such as zoning rules—which only incidentally impinge on a person's right to practice religion—to a strict scrutiny standard of judicial review.

This language is very similar to the RFRA provisions that the Court found unconstitutional in *Boerne*. We must therefore proceed carefully to ensure that the RLPA passes constitutional muster, and work diligently to develop the legislative record that the Supreme Court found wanting during its review of our prior efforts with the RFRA. We must also ensure that any statute we consider does not unduly bur-

den the efforts of states and localities to administer neutral, generally applicable laws. I look forward to this hearing on this important issue.

The CHAIRMAN. Elder Oaks.

**PANEL CONSISTING OF DALLIN H. OAKS, MEMBER, QUORUM OF THE TWELVE APOSTLES, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, SALT LAKE CITY, UT; RICHARD D. LAND, PRESIDENT-TREASURER, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, NASHVILLE, TN; DAVID ZWIEBEL, DIRECTOR OF GOVERNMENT AFFAIRS AND GENERAL COUNSEL, AGUDATH ISRAEL OF AMERICA, NEW YORK, NY; AND ELLIOT M. MINCBERG, VICE PRESIDENT AND LEGAL DIRECTOR, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC**

#### STATEMENT OF DALLIN H. OAKS

Elder OAKS. Thank you, Mr. Chairman. I am privileged to appear before you to testify in support of congressional enactment of S. 2148, the Religious Liberty Protection Act of 1998. I am here as a representative of the Church of Jesus Christ of Latter-day Saints to present the official position of that church. As you have noted, Mr. Chairman, I speak from considerable personal experience with the law of church and State.

The history of the Church of Jesus Christ of Latter-day Saints, sometimes called Mormon or L.D.S., illustrates why government should have a compelling interest before it can pass valid laws to interfere with the free exercise of religion. No other major religious group in America has endured anything comparable to the officially sanctioned persecution imposed upon members of my church in the 19th century by Federal, State and local governments. Mormons were driven from State to State, sometimes by direct government action, and finally expelled from the existing borders of the United States, only to be persecuted anew when those borders expanded to include the territory of Utah.

This is not academic history to me. My third great grandmother, Catherine Prichard Oaks, lost most of her possessions when a Missouri State militia drove the Mormons out of that State in 1838. Seven years later, when State authorities stood by while a lawless element evicted the Mormons from Illinois, she lost her life from exposure on the plains of Iowa.

My wife's second great grandparents, Cyril and Sally Call, hid in a corn field as a mob burned their home in Illinois. My great grandfather, Charles Harris, was sent to prison in the Utah Territory in 1893 for his practice of plural marriage. His oldest daughter, my great aunt, Belle Harris, was the first woman to be imprisoned during Federal prosecution of Mormons in the 1880's.

The conflict between religious-based conduct and government regulation of religious practices remains today. The free exercise of religion enshrined in our Constitution is in jeopardy and cries out for protection. There is nothing more sacred than a devout person's worship of God, nothing more precious than that person's practice of his or her religion.

With the abandonment of the compelling governmental interest test in the case of *Employment Division v. Smith*, the Supreme

Court has permitted any level of government to enact laws that interfere with an individual's religious worship or practice so long as those laws are of general applicability, not overtly targeting a specific religion. This greatly increased latitude to restrict the free exercise of religion must be curtailed by restoring the compelling governmental interest test.

The testimony of other witnesses will show that in the half decade since the *Smith* case, numerous religious practices have already fallen victim to the increased government power it unleashed. In addition, I wish to put into the record of this committee the entire testimony given at a recent hearing of the House Judiciary Subcommittee on the Constitution by Professor W. Cole Durham, of Brigham Young University. His testimony provides compelling evidence that the *Smith* test is burdening religious freedom in many areas.

For example, he reported a land use study he conducted with attorneys of the prestigious Chicago law firm of Mayer, Brown and Platt. This study examined reported cases involving free exercise challenges to land use regulation. It started from the basic proposition that if land use laws and decisions are really being generally and neutrally applied, land use decisions and policies should impact all religions, and other land use applicants as well, in a consistent way.

The joint study not only failed to find consistency in the application of land use laws to different religious associations; it found a huge disparity. Professor Durham testified, "Minority religions, representing less than 9 percent of the population, were involved in over 49 percent of the cases regarding the right to locate religious buildings at a particular site." Thus, the proportion of land use challenges to minority religions disclosed in this study is more than 5 times the number we would expect if minority religions experienced such challenges in the same proportion as their proportion of the total population.

Professor Durham testified, "There may, of course, be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role."

[The prepared statement of Mr. Durham follows:]

PREPARED STATEMENT OF PROFESSOR W. COLE DURHAM, JR.,  
OF BRIGHAM YOUNG UNIVERSITY

It is a great honor for me to address this body today on legislation vital to protecting one of our preeminent liberties: religious freedom. I have spent much of the past decade working in support of this great principle: in my home state of Utah, at the federal level, and as a comparative law expert in many of the countries emerging from the yoke of communism. Experience in all these contexts has reaffirmed my conviction, in setting after setting, that religious freedom is one of the bedrock principles of any just human society. As Madison rightly argued over two centuries ago in his famous Memorial and Remonstrance, religious freedom "is in its nature an unalienable right" because it relates to duties that are "precedent, but in order of time and in degree of obligation, to the claims of Civil Society."<sup>1</sup>

While this hearing rightly focuses on issues of United States constitutional law, it is worth remembering that the principle of religious freedom is deeper and more

<sup>1</sup>James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *The Mind of the Founder: Sources of the Political Thought of James Madison*, Marvin Meyers, ed. (rev. ed. 1981). The Memorial and Remonstrance is also reprinted as an appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947).

absolute than any constitution. The Universal Declaration of Human Rights, whose fiftieth anniversary is celebrated this year, clearly recognized (as did our founding fathers) that religious freedom is not a right conferred on individuals by states; it is a right possessed by *everyone* simply by virtue of being human. Our Constitution is hallowed in no small part because it was one of the first great charters of human history to protect the deeper principle of religious freedom. Moreover, our constitutional history as a people remains impressive because of ongoing efforts to protect this cherished liberty. The legislation we are discussing today, if enacted, will be part of our generation's elaboration of the American heritage of religious freedom.

#### I. GENERAL CONSIDERATIONS CALLING FOR ADOPTION OF THE RELIGIOUS FREEDOM PROTECTION ACT

Congressional action is vital because religious freedom faces unique challenges at this juncture in our history. These challenges are not limited to the fact that the United States Supreme Court has radically and unnecessarily narrowed the scope of religious freedom protections as traditionally understood in this country.<sup>2</sup> They flow from the pervasiveness of the modern state, the increasing pluralization of culture, and powerful forces of secularization. Each of these three factors intensifies the need for added protection of religious freedom.

This is most obvious as one considers the massiveness of the modern state. The seemingly inexorable expansion of state activity into more and more sectors of life increases the number of areas in which state and religious activity can come into conflict, and where religious freedom protections are vital to protect individual and collective religious activity. This Hearing, previous hearings on the legislation in question, and all the hearings on the earlier Religious Freedom Protection Act, were replete with evidence of the many areas in which religious freedom is threatened if encroaching governmental action is not strictly scrutinized.

The increasing pluralism of contemporary society further compounds the potential friction points between religious activity and the state. Some, including Justice Scalia in the *Smith* decision, have cited this factor as an argument against accommodation of religious difference. But this runs counter to our historical experience. What the American experiment has shown, and shown stunningly (if not always perfectly), is that accommodation and toleration are much more effective in promoting social stability and flourishing than insistence on homogeneity and standardization. Increasing pluralism calls for more, not less religious freedom, because in addition to being right, respect for difference pays richer social dividends than wooden insistence on conformity.

Less obvious, perhaps, is the challenge posed by progressive secularization, which is particularly evident among our intellectual elites. Secularization is gradually dulling our sensitivities to the vital importance of religion and religious freedom to the strength of our republic. The importance of religion to society was obvious to the founders and to many of the greatest commentators on American life, such as Alexis de Tocqueville. But in secularized minds, the legitimate interests and claims of religion seem to fade in importance or to be marginalized when balanced against the secular interests that are the focus of most governmental programs. Secular purposes look neutral, even when they have severe ramifications for religious life, whereas religious beliefs are suspect. What results is a kind of secular blindness, or at least myopia, that results in progressive underprotection of religious rights.

This trend is compounded by those thinkers about religious rights, including some at this hearing today, who advocate various versions of what might be called "secular reductionism." Some contend that religious rights can simply be reduced to other more secular rights, such as freedom of speech, or association, or the right to equal protection. Others view religious freedom through a paradigm of equality, in which the idea of religious freedom is reduced to a mere non-discrimination norm. Too often, even the residual equality norm to which religious freedom is reduced grows insensitive to the value of religious difference. It is axiomatic in dealing with equality norms that substantive equality cannot be achieved without taking relevant differences into account. But secularized equalitarians are all too prone to forget that religion and the right to religious freedom constitute relevant differences that need to be taken into account in order to provide genuine substantive equality. Whatever one ultimately thinks about the balance of liberty and equality, it is fair to say that the greatness of our tradition in religious liberty will be impoverished if we do not understand that at its core it is about the protection of religious dif-

<sup>2</sup>*City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Employment Division v. Smith*, 494 U.S. 872 (1990).

ferences, religious pluralism, and religious conscience, and that sometimes these values are so strong that they even override otherwise relevant equality claims.

The Religious Freedom Protection Act helps remedy the foregoing problems by insisting, at least in those areas where Congress has continuing power after *Boerne*, that governmental incursions on religiously motivated conduct shall be strictly scrutinized. This does not mean that all state action and state norms thus scrutinized will be invalidated. No one has ever claimed that the right to engage in religiously motivated conduct is absolute. But it does assure that government officials cannot ride roughshod over religious claims, that they will need to consider carefully whether they can structure their programs in ways that are less burdensome to religious believers and organizations, and that only when they have strong justification will they be allowed to override religious concerns. Insisting on such justification does not constitute an unfair privileging of religion; it simply recognizes the distinct and sensitive role that religion plays in social life, and that state action that fails to respect its distinctive character is unjust.

## II. THE NEED FOR SPECIAL PROTECTION OF RELIGIOUS FREEDOM IN THE FIELD OF LAND USE PLANNING

When I was invited to appear at this Hearing, I was asked to focus in particular on religious freedom issues that arise in the area of land use. In the balance of my remarks, I will turn to this area. In my view, the problems encountered by religious organizations in the area of land use are symptomatic of a larger set of problems that religious organizations face in the modern regulatory state. Thus, I hope my remarks in what follows will be understood both as documentation of concerns in the land use area in particular and at the same time as a case study providing evidence more generally of the need for the Religious Freedom Protection Act.

Conflicts between free exercise of religion and land use date back to the earliest days of the American colonial period. One of the most famous early cases of religious persecution in America involves the expulsion of Anne Hutchinson from Massachusetts Bay. While the case obviously antedates modern land use statutes, many of the elements are familiar. Apparently, Ms. Hutchinson attracted the disfavor of the establishment because she started holding regular sessions in her home to discuss (and criticize) sermons held in the dominant church. She started a women's club in her home to discuss the sermon and the Bible each week. The attendance at these meetings increased with the controversy over the banishment of Roger Williams. Women were attracted to Anne and wanted to hear her opinions. The first formal action taken against her was a resolution of the assembly in 1637, which, as reported by her principal antagonist, John Winthrop, read as follows:

That though women might meet (some few together) to pray and edify one another, yet such an assembly, (as was then the practice in Boston), where sixty or more did meet every week, and one woman (in a prophetic way, by resolving questions of doctrine, and expounding the scripture) took upon her the whole exercise, was agreed to be disorderly, and without rule.<sup>3</sup>

In a modern setting, planning authorities would have complained of inadequate parking, traffic problems, and other signs of "intensive" land use. A sanction as austere as formal banishment in 17th century New England would have been an unlikely, but modern authorities might have proven as adept at finding a neutral rubric (here, "disorderly conduct") to exclude an unpopular religious activity.

The field of land use is particularly vital for the simple reason that religious activity, particularly the communal life of a religious group, necessarily involves using land. To some extent, this simply states the obvious, but some detail about the nature of religious land use in the United States may be helpful. The 1994 Report on the Survey of Religious Organizations at the National Level (the "Survey"), conducted by the Northwestern University Survey Laboratory and the DePaul Law School's Center for Church/State Studies (with which I am involved), surveyed approximately 300 religious denominations in the United States, including virtually all major denominations.<sup>4</sup> It found that nearly all religious organizations hold religious gatherings at least once a week. Not surprisingly, 96 percent of the respondents indicated that religious gatherings are held at a single permanent location. Eighty-

<sup>3</sup>Quoted in Carl Holliday, *Woman's Life in Colonial Days* 40 (Boston: Cornhill Publishing Company, 1992).

<sup>4</sup>My summary of the Survey draws on a summary prepared by Professor Angela Carmella in a chapter entitled "Land Use Regulation of Churches" that will appear in *The Structure of American Churches: An Inquiry into the Impact of Legal Structures on Religious Freedom*, which is to be published under the auspices of the DePaul Center for Church/State Studies. (I am an Associate Editor of this volume.)

nine percent of those utilizing such structures own them outright; 11 percent of respondents indicated that structures are leased.<sup>5</sup> In addition, "approximately two-thirds \* \* \* engage in social service or welfare activities; over 80 percent are involved in education;<sup>6</sup> nearly 60 percent provide recreation or social activities;<sup>7</sup> 85 percent are involved in communications;<sup>8</sup> one-third have retreat centers; and 40 percent have cemeteries."<sup>9</sup> These figures do not reflect the number of religious associations that operate hospitals or other health care facilities, nor do they reflect a variety of other programs carried out by religious social services agencies. Fifty-four percent of the respondents indicate that their national bodies own real property that is not used for worship purposes, as do the local units of 54 percent of the respondents.<sup>10</sup> Educational facilities and clergy housing are the most commonly held non-worship properties.<sup>11</sup> In addition, approximately one-fifth of the organizations surveyed indicate that they invest in real estate to raise funds.<sup>12</sup>

For the most part, the government officials dealing with land use issues in the nearly 70,000 local government entities of the United States are tolerant and respectful of religious rights. Nonetheless, particularly when community opposition is strong, or when the fashionable orthodoxies of the planning or historic preservation worlds are challenged, problematic instances occur.

It is difficult to measure with precision the extent to which intentional religious discrimination plays a role in the problematic cases. As noted in *American Friends of Soc'y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979),

Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area. Under such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude the exercise of constitutionally protected privileges.

Despite such instinctive efforts on the parts of governing bodies to avoid the appearance of intolerance, I have absolutely no doubt it is a substantial factor in a large number of cases, particularly where smaller or less popular groups are involved.

Strong evidence for this conclusion is provided by a study I prepared with colleagues from the B.Y.U. Law School and at the law firm of Mayer, Brown & Platt in January, 1997. A copy of the study is attached as an appendix to my statement. Essentially, the study reviewed all the reported cases we were able to identify involving free exercise challenges to land use regulation. These cases significantly understate the number of situations in which religious groups *believe* that their religious rights are being violated. A variety of practical disincentives—ranging from the need to have good working relationships with local officials and neighbors, to religiously based impulses to go the second mile, to the sheer cost of litigation, to the availability of other sites and the unattractiveness of settling among manifestly prejudiced neighbors—all operate to deter religious groups from over-litigating their claims.

Cases were classified into two broad categories, essentially to see if there are significant differences between new construction situations ("location cases") and cases dealing with whether an accessory use (such as a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases"). The cases were also classified by denomination, to the extent that is possible based on case name or other information in the body of the decision. Information on size of denomination was based on data from a massive study that provides the best available estimates of church affiliation based on self-described affiliation.

With this data in hand, we proceeded to compare the treatment received by smaller religious groups (those with 1.5 percent of the population or less) with that re-

<sup>5</sup> Survey, MQ41.

<sup>6</sup> Forty-four percent of the organizations surveyed indicated owning one or more educational facilities. Survey, MQ14.

<sup>7</sup> Of these, 54 percent provide recreation centers, and 80 percent have campgrounds. Survey, MQ58 D and G.

<sup>8</sup> Ten percent of these have a television station; 24 percent have a radio station.

<sup>9</sup> Id.

<sup>10</sup> Survey, MQ10, MQ42.

<sup>11</sup> Nearly one-third reported owning clergy housing or other real estate.

<sup>12</sup> Survey, MQ30.

ceived by larger groups. If land use laws were being applied in a neutral fashion, one would expect roughly equal treatment. But in fact, the situation is quite different. Minority religions representing less than 9 percent of the population were involved in over 49 percent of the cases regarding the right to locate religious buildings at a particular site, and in over 33 percent of the cases seeking approval of accessory uses. The disproportionate burden becomes even more distressing if one takes into account smaller non-denominational or other unclassified groups. If these are counted, over 68 percent of reported location cases, and over 50 percent of accessory use cases, involve smaller religious groups.

While a study of this type can at best give a rough picture of what is happening, the conclusion seems inescapable that illicit motivation is affecting disputes in the land use area. There may of course be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role.

Significantly, the judicial success rate for small religious groups and larger groups is essentially the same. The smaller groups won approximately 66 percent of the cases in which they were involved, whereas larger religious groups won approximately 65 percent of the cases in which they figured. These figures suggest that judicial review has on balance tended to help smaller religious groups. At the same time, they indicate that judicial decisions tend to be more impartial across groups, and that there is no reason to think the high proportion of disputes involving smaller religious groups reflects higher levels of ungrounded claims.

The magnitude of the problem is reinforced when one considers that the reported cases are only the tip of the iceberg, since for the reasons discussed above, most religious groups bend over backwards to avoid conflicts with future neighbors and city officials they must deal with on a continuing basis. That is, religious groups are much much more likely to give up on claims they may believe are valid in the interest of social peace than they are to aggressively litigate questionable claims. If anything, then, the study, with whatever unavoidable imperfections it may have, significantly understates the problems religious groups face.

Note that while the problems for smaller religious groups are particularly acute, the burdens faced by larger groups are not insignificant. A recent survey commissioned by the Presbyterian Church USA—a mainline denomination by anyone's definition—noted that 23 percent of its congregations had needed to obtain some sort of land use permit since January 1, 1992. Significant conflicts with city/county staff, neighbors, commission members, or others were encountered with respect to 10 percent of the land use approvals thus needed, although only 1 percent of the approval needed have thus far been denied (with 4 percent remaining unresolved).<sup>13</sup>

The patterns of discrimination suggested by the foregoing statistics are all too familiar to those working in the religious land use area. In case after case, the plaintiff is a religious group that has obtained options on lot after lot, or has actually purchased a succession of lots, often at the suggestion of city officials, only to have a zoning request, a conditional use permit, a variance, or some other land use approval denied as opposition from local citizens climbs, even though similar religious uses from larger religious groups have been approved. This is exactly what happened when The Church of Jesus Christ of Later-day Saints sought a zoning change for a temple site in Forest Hills, Tennessee, as described in detail by Von Keetch in an earlier hearing held on March 26, 1998.<sup>14</sup> It is a familiar litany in many cases involving Jehovah's Witnesses. And it is an even greater problem for newer or non-Christian religious groups.

The facts of discrimination were particularly blatant in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). A Muslim group that served primarily students at the University of Mississippi in Starkville sought necessary approvals for a place of worship near campus. Unfortunately, Starkville's zoning ordinance prohibited the use of buildings as churches in all the areas within the city limits that were near campus, and there was no place in the city in which worship facilities were permitted as of right. The Islamic Center considered three successive lots as possible worship sites, but each time was told by the City's building codes official that the sites could not be approved, either because of inadequate parking, heavy traffic on an adjacent street, or the risk of traffic congestion. The leaders then met with the building code official, and asked "exactly where we can locate," and was told that a fourth location would be excellent, if sufficient parking was provided. The representatives of the Center then bought the property, and provided 18 parking spaces. The planning commission recommended approval. The Center then sought a building permit, which was at first refused, then approved as

<sup>13</sup> Supplement to the Session Annual Statistical Report: End of Year 1997, Question 7-8.

<sup>14</sup> See Statement of Von G. Keetch, pp. 11-17.

commercial, and then revised to be residential. Ultimately, however, the use had to be approved by the Board of Aldermen, and despite recommendations of approval from staff, the Board denied the approval when a neighbor claimed that the use would cause "congestion, parking, and traffic problems." The Board thereupon denied the exception to the zoning ordinance that was sought. Subsequently some city officials inspected the building for conformity with fire and electrical requirements, and approved its conformity for worship. But several months later, in response to complaints about worship activities, the City ordered the Islamic Center to stop holding worship services at its building. What made this whole course of action particularly galling was that there was a residence next door that was used as a worship center for Pentecostal Christians. This group caused more noise, provided less parking and in general seemed less deserving of a zoning exception than Islamic Center. Five more churches were located within a quarter mile of the Center. The District Court, after holding that "congregational prayer for Muslims is desirable, but not mandatory," and that the "Starkville city ordinance does not preclude students from purchasing cars and driving to a worship site located [outside Starkville's city limits]," concluded that

[s]tanding along, the denial of the \* \* \* [Center's] zoning application is not enough upon which to base an inference of discrimination. \* \* \* The actions of the Board were supported by valid traffic considerations, and there is no evidence to suggest that it improperly considered plaintiffs' religion in reaching its decision.

Therefore, it held, the zoning ordinance did not violate the Islamic student's rights to free exercise of religion or substantive due process.<sup>15</sup>

Fortunately, the Circuit reversed, applying a heightened scrutiny test to reject the District Court's wooden deference to blatantly discriminatory state action and its decision that Starkville's zoning ordinance did not burden the Islamic students' free exercise rights. The Fifth Circuit Court rightly compared the comments about how poor Islamic students could simply buy cars to drive to church across town or outside the city limits to "Anatole France's comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges \* \* \*" <sup>16</sup>

The difficulty is that in far too many cases, as noted in the *Schwab* case quoted above, land use decisions are wrapped in neutral sounding language about parking, setbacks, traffic impacts, and the like which may constitute substantial and tangible harm to surrounding property owners, but in too many cases merely serves as an empty verbal mask illicit discriminatory conduct aimed at the exercise of religion. Thus, lack of parking facilities that results in constant overparking of a narrow street, disrupting traffic and blocking neighboring driveways may constitute a genuine problem, but it does not justify excluding a religious use from an area if adequate on site parking is provided (as was the case in *Islamic Center*) or if the religious use is needed at the location in question precisely because of religious requirements that participants must walk to the service.<sup>17</sup> References to increased traffic flows may constitute a genuine risk to health and safety, or they may simply reflect moderate increases as likely to result without the religious use. Wooden insistence on setback or bulk requirements may be unnecessary, or may constitute an aesthetic concern that should give way to weightier religious freedom concerns. Building code problems may flag substantial health and safety risks, or they may relate to matters that are routinely waived in a community.

The point is that land use provisions, while often assumed to be part of general and neutral regulatory schemes, characteristically involve permit schemes analogous to those struck down in *Cantwell v. Connecticut*,<sup>18</sup> which grant local officials essentially standardless discretion to determine whether religious practices may go forward. Constitutional rights to the free exercise of religion are of little practical value if they permit control of the meeting place of a church to pass from its members to government outsiders without any examination of the government's asserted need for such control. Yet, unless the goals of land use authorities are tested against more searching scrutiny than neutrality and general applicability, agency officials have no occasion and no motivation to consider the value of pursuing their regulatory goals relative to the substantial burdens this pursuit may impose on the free

<sup>15</sup> *Id.* at 298 (citing District Court opinion).

<sup>16</sup> *Id.* at 298-99.

<sup>17</sup> *Orthodox Minyan of Elkins Park v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Cmwlth. 1989) ("It is ironic that the Board denied a special exception to convert a property to religious use on the grounds of increased traffic flow to a group whose religion prohibits them from driving automobiles during their day of worship").

<sup>18</sup> 310 U.S. 296, 304-307 (1940).

exercise of religion. As the Supreme Court noted in *Church of Lukumi Babalu Aye v. City of Hialeah*,<sup>19</sup> "The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."<sup>20</sup>

Significantly, the Supreme Court's decision in *Smith* jettisons strict scrutiny only as to neutral and generally applicable laws. As was clear even before *Smith* made the fact relevant "[z]oning laws are peculiar in that they are not really laws of general applicability but are, rather, linked to individual properties."<sup>20</sup> Some courts have built on this fact to hold that strict scrutiny continues to apply in the land use area as a reasonable construction of language in the *Smith* decision explicitly designed to avoid overturning *Sherbert* and its progeny. Thus, in *First Covenant Church v. Seattle*,<sup>21</sup> the Washington Supreme Court found that a landmark designating ordinance was not general, because its criteria for application necessitated industrial evaluations of each potential landmark property, and was not neutral because of an exception for liturgy-based structural changes,<sup>22</sup> and hence that the challenged ordinance failed under strict scrutiny. The court in *First United Methodist Church of Seattle v. Seattle Landmarks Preservation Board*,<sup>23</sup> reached a similar conclusion, holding that while a particular church could be landmarked, it would violate the free exercise clause to allow restrictive features of the landmarking ordinance to be enforced so long as the building remained devoted to religious uses. While all courts have not reached the same conclusion,<sup>24</sup> Congress may legitimately exercise its power under Section 5 of the 14th Amendment to remedy violations and to assure protection of free exercise values that remain protected under the reasonable interpretation of *Smith* advanced by the Washington cases.

One of the major problems in the land use area is that the public officials charged with enforcing them are all too prone to undervalue the concrete needs of religious activity as opposed to the other planning and preservation values. In part this is a reflection of what I called "secular blindness" or "secular myopia" above, and in part, it is a natural corollary of commitment to planning and preservation values that result in their assuming planning or preservation responsibilities in their communities. In the preservation context, the historical value of churches is sometimes given priority over the practical needs of living religion. In the planning context, idealized notions of the aesthetics and logic of urban layout are given greater credence than the need to allow land uses that can accommodate the needs of religious groups with sufficiently strong needs to be located in a city to be able to acquire property and that will be as workable for the religious community as for residential neighborhoods and other more powerful blocs of the citizenry. The underlying values involved cannot be adequately balanced if any land use regulations the relevant authorities happen to prefer are determined to be "neutral and general" laws virtually immune to any religious freedom challenge.

If courts are not authorized to invoke the kind of heightened scrutiny called for by the Religious Freedom Protection Act, it seems highly plausible to expect that the situation of minority religious groups will further deteriorate, because courts will not be able to be as effective in rectifying the problems encountered by smaller groups as they have been in the past. In the absence of such heightened scrutiny, courts will have a much more difficult time unmasking discriminatory conduct and a much stricter obligation to be deferential to land use authorities. Ironically, this could lead to a situation in the future in which the disparity between reported land use cases of larger and smaller groups is reduced, not because the smaller groups believe their rights are being vindicated, but because they perceive the prospects of vindicating those claims in court are hopeless, and therefore cease bringing cases in the future that they might have pursued in the past.

The Religious Freedom Protection Act is well designed to remedy the types of problems identified by the analysis of reported land use cases submitted herewith, and made more concrete by consideration of the various cases discussed above. By focusing on laws which "substantially burden religious exercise", while at the same time disallowing inquiry into the centrality of the beliefs affected, the Act assures that the legislation will not result in unreasonable constraints on governmental ac-

<sup>19</sup> 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J. concurring)).

<sup>20</sup> See Kenneth Pearlman, *Zoning and the Location of Religious Establishments*, 31 Cath. Law. 314, 335 (1988).

<sup>21</sup> 120 Wash. 2d 203, 840 P.2d 174 (1992).

<sup>22</sup> 120 Wash. 2d at 214-15, 840 P.2d 174.

<sup>23</sup> 76 Wash. App. 572, 887 P.2d 473 (1995).

<sup>24</sup> See, e.g., *St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (sustaining a landmarking statute as a neutral and general law).

tion. The insistence that land use authorities use the "least restrictive means" available to promote their policies is only reasonable: continuing in a more burdensome course is tantamount to intentional imposition of gratuitous injury to religious sensitivities. Finally, the insistence on "substantial and tangible harm" provides a meaningful standard (and one that is as precise as the subject matter allows) for assuring that only genuinely significant land use concerns will be able to override religious liberty claims.

The highly individualized processes of land use regulation readily lend themselves to discrimination that is difficult or impossible to prove in individual cases, but which is in fact pervasive, as the study submitted herewith demonstrates. The heightened scrutiny of land use regulation called for in the Act will be an invaluable tool in helping to root out such discrimination. Congress has power under Section 5 of the 14th Amendment to support remedial legislation of this type. Significantly, Sections 3(b)(1)(B) and (C) are independently sustainable for independent reasons. Section 3(b)(1)(B) codifies the rule that it is unconstitutional to wholly exclude First Amendment activity from a jurisdiction.<sup>25</sup> If this principle were not sound, religious communities would be afforded less protection against land use authorities than adult theaters, book stores, and other similar businesses. Section 3(b)(1)(C) codifies the rule that discrimination between different categories of speech, and particularly between differing viewpoints as applied to land use regulations that permit secular assemblies while excluding churches. Of course, religious discrimination does not lurk behind every land use decision, but this is not the requirement. *Boerne* allows assertion of Congressional power in contexts where "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."<sup>26</sup> Without remedial action, the pattern of discrimination established by the study submitted herewith is all too likely to continue. Thus, Congress has power to enact the land use provisions of the Religious Liberty Protection Act.

Before concluding, let me make a few final remarks regarding Commerce Power. At the outset, I wish to emphasize that in what follows I do not maintain that religious activity and commercial activity should be confused. Religious activity is not commerce, and even in the absence of First Amendment constraints, would not be regulable as commerce. Having said this, however, no one can doubt that religious activity *substantially affects* interstate commerce. A few examples will have to suffice to suggest the extraordinary range of effects that are obviously germane to the land use area. Land use regulations affect whether or not new religious buildings can be constructed. Religious institutions spend large amounts to build and maintain facilities for worship and for a variety of religiously motivated collateral activities, such as the provision of education, health care, recreational facilities and so forth. Currently, land use rules create what could easily be seen as an excessive market for real estate options, as the sorry experience of numerous religious groups in proffering site after site to local planning authorities confirms. Many religious organizations are interstate and indeed international organizations. The DePaul Survey cited above indicates that while approximately 60 percent of the denominational respondents indicate that final decisions as to location and property acquisition are made at the local level, nearly 20 percent indicated that such decisions are made by state, regional, or national bodies.<sup>27</sup> This means that for a substantial number of religious organizations, decisions regarding church building and expansion are made in one state and implemented in another. Funds typically flow in interstate commerce from one location to another.

In some ecclesiastical polities, funds are collected and retained at the local level, but in others, they are gathered, transferred electronically to a central location, and then distributed back out nationally or internationally in accordance with the needs of various congregations. Charitable aid flowing through these channels depends to some extent on where congregations are ultimately located. Even where facilities are leased, the funds involved often flow in interstate commerce. Local as well as national organizations often own retreat facilities which may be located at a distance, even in a different state. Many religious organizations undertake humanitarian aid projects that involve sending goods (e.g., clothing) and services (e.g., medical aid) across state and international boundaries.

City regulation of religious land use has the potential to divert the flow of commerce from one state to another. Certainly, it often impedes the flow, for substantial periods, while churches administered nationally look for alternative sites. The L.D.S. Church currently builds 300-400 churches, typically running into the multi-

<sup>25</sup> *Schad v. Bourrough of Mt. Ephraim*, 452 U.S. 61 (1981).

<sup>26</sup> 117 S. Ct. at 2170.

<sup>27</sup> DePaul Survey, MQ43.

million dollar range, each year. Approximately half of these would be built in various states of the United States, and the remainder are located internationally.

Some religious facilities may attract believers to travel across state lines to regional retreat or worship facilities. Temples have this characteristic for believing Mormons; countless other churches have similar structures. The location of a new church building in a municipality will typically result in a new flow of literature, media items, computers, and other such matters, as well as the installation of new interstate telephone lines and other means of communication. Often, supervisory personnel will need to travel to assure that new construction is handled properly and that existing facilities are properly maintained.

All too frequently, the current land use regime operates as a kind of non-tariff trade barrier against new and less popular religious groups, with ripple impacts on all the other types of commerce that the new religious activity would otherwise stimulate.

Examples could be multiplied, but what has been said amply supports the truly massive impact religious activity in general, and more particularly, religious activity directly impacted by land use regulation, has on interstate commerce. Particularly when replicated across denominations and across the thousands of municipalities in the United States, the substantial effect on commerce is undeniable. Eliminating unjustified burdens on religious exercise will promote commerce, and justifies Congressional intervention to assure that religious activity substantially affects commerce is not unfairly burdened by differential land use regimes around the country.

Elder OAKS. Mr. Chairman, when I last testified before a congressional committee, it was to support the enactment of the Religious Freedom Restoration Act. Now that the Supreme Court has held RFRA unconstitutional, you and many of your colleagues have worked hard to develop alternative legislation using, as you have observed here, Congress' well-tested Commerce and Spending Clause authorities to reinstate the compelling governmental interest test throughout the Nation. We applaud this approach. The Religious Liberty Protection Act of 1998 is a very sophisticated piece of legislation. We thoroughly endorse its enactment.

The Bill of Rights protects principles, not constituencies. The worshippers who need its protection are the beleaguered minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that reality. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members, including many of my own ancestors, repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless clearly required by a compelling governmental interest.

It is nothing short of outrageous that the Supreme Court currently extends extraordinary constitutional protection to words that cannot be found within the Constitution, such as the right to privacy, while abandoning the vital compelling governmental interest requirement that is needed to ensure effectiveness of the express Bill of Rights language guaranteeing the free exercise of religion. The fact that the Constitution has two express provisions on religion suggests that religious freedom was meant to have a preferred position, but the Supreme Court's *Smith* decision has now consigned it to an inferior one.

Religious organizations and religious worship and practices have been forced out of their constitutional sanctuary and into the public square, to be treated like every other organization and activity without unique constitutional guarantees. We appeal to Congress

to use its legislative power to restore religion to its rightful sanctuary.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Elder Oaks.

[The prepared statement of Elder Oaks follows:]

#### PREPARED STATEMENT OF ELDER DALLIN H. OAKS

##### INTRODUCTION

Mr. Chairman, I am privileged to appear before you to testify in support of Congressional enactment of S. 2148, the Religious Liberty Protection Act of 1998. I am here as a representative of The Church of Jesus Christ of Latter-day Saints to present the official position of that Church. I speak from considerable personal experience with the law of church and state.

##### HISTORY

The history of The Church of Jesus Christ of Latter-day Saints (sometimes called Mormon or L.D.S.) illustrates why government should have a "compelling interest" before it can pass valid laws to interfere with the free exercise of religion. No other major religious group in America has endured anything comparable to the officially sanctioned persecution imposed upon members of my church in the nineteenth century by federal, state, and local governments. Mormons were driven from state to state, sometimes by direct government action, and finally expelled from the existing borders of the United States, only to be persecuted anew when those borders expanded to include the Territory of Utah.

This is not academic history to me. My third great grandmother, Catherine Prichard Oaks, lost most of her possessions when a Missouri state militia drove the Mormons out of that state in 1838. Seven years later, when state authorities stood by while a lawless element evicted the Mormons from Illinois, she lost her life from exposure on the plains of Iowa. My wife's second great grandparents, Cyril and Sally Call, hid in a cornfield as a mob burned their home in Illinois. My great-grandfather, Charles Harris, was sent to prison in the Utah Territory in 1893 for his practice of plural marriage. His oldest daughter, my great aunt, Belle Harris, was the first woman to be imprisoned during federal prosecution of Mormons in the 1880's.

##### THE COMPELLING GOVERNMENTAL INTEREST TEST MUST BE RESTORED

The conflict between religious-based conduct and government regulation of religious practices remains today. The free exercise of religion, enshrined in our Constitution, is in jeopardy and cries out for protection. There is nothing more sacred than a devotee person's worship of God—nothing more precious than that person's practice of his or her religion.

With the abandonment of the "compelling governmental interest" test in the case of *Employment Division v. Smith*, the Supreme Court has permitted any level of government to enact laws that interfere with an individual's religious worship or practice so long as those laws are of general applicability, not overtly targeting a specific religion. This greatly increased latitude to restrict the free exercise of religion must be curtailed by restoring the compelling governmental interest test.

##### RELIGIOUS BURDENS UNDER SMITH

The testimony of other witnesses will show that in the half-decade since the *Smith* case numerous religious practices have already fallen victim to the increased government power it unleashed.

In addition, I wish to put into the record of this Committee the entire testimony given at a recent hearing of the House Judiciary Subcommittee on the Constitution by Professor W. Cole Durham of Brigham Young University. His testimony provides compelling evidence that the *Smith* test is burdening religious freedoms in many areas.

For example, he reported a land-use study be conducted with attorneys of the prestigious Chicago law firm of Mayer, Brown & Platt. This study examined reported cases involving free exercise challenges to land-use regulation. It started from the basic proposition that if land use laws and decisions are really being generally and neutrally applied, land use decisions and policies should impact all religions (and other land use applicants as well) in a consistent way.

The joint study not only failed to find consistency in the application of land-use laws to different religious associations; it found a huge disparity.

Professor Durham testified:

Minority religions representing less than 9 percent of the population were involved in over 49 percent of the cases regarding the right to locate religious buildings at a particular site.

Thus, the proportion of land-use challenges to minority religions disclosed in this study is more than five times the number we would expect if minority religions experienced such challenges in the same proportion as their proportion of the total population.

Professor Durham testified:

There may, of course, be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role.

#### THE RELIGIOUS LIBERTY PROTECTION ACT OF 1998

Mr. Chairman, when I last testified before a Congressional Committee, it was to support enactment of the Religious Freedom Restoration Act ("RFRA"). Now that the Supreme Court has held RFRA unconstitutional, you and many of your colleagues have worked hard to develop alternative legislation, using Congress' well tested commerce and spending clause authorities to reinstate the compelling governmental interest test throughout the nation. We applaud this approach. The Religious Liberty Protection Act of 1998 is a very sophisticated piece of legislation. We strongly endorse its enactment.

#### CONCLUSION

The Bill of Rights protects principles, not constituencies. The worshipers who need its protection are the beleaguered minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that reality. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members, including many of my own ancestors repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless clearly required by a "compelling governmental interest."

It is nothing short of outrageous that the Supreme Court currently extends extraordinary constitutional protection to words that cannot be found within the Constitution, such as the "right to privacy," while abandoning the vital "compelling governmental interest" requirement that is needed to ensure the effectiveness of the express Bill of Rights language guaranteeing the free exercise of religion. The fact that the Constitution has two express provisions on religion suggests that religious freedom was meant to have a preferred position, but the Supreme Court's *Smith* decision has now consigned it to an inferior one.

Religious organizations and religious worship and practice have been forced out of their constitutional sanctuary and into the public square to be treated like every other organization and activity without unique constitutional guarantees. We appeal to Congress to use its legislative power to restore religion to its rightful sanctuary.

Thank you Mr. Chairman.

The CHAIRMAN. Dr. Land.

#### STATEMENT OF RICHARD D. LAND

Mr. LAND. I want to thank you for the opportunity to testify on this issue of critical importance to all who cherish religious liberty.

As Chairman of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, I am frequently in a position to hear from people across America about their religious liberty concerns. These individuals are not legal scholars. They do not spend their spare moments perusing legal opinions published by our judicial system. They are not familiar with the meaning behind technical legal terms. They do not talk about strict scrutiny or compelling interests or least restrictive means.

Yet, despite their unfamiliarity with the nuances of a specialized area of the law, they sense that something is fundamentally wrong with the status of religious liberty in our country, particularly when it clashes with the secular interests of government. As government's pervasive influence increases, so does the concern of millions of Americans who sense that their fundamental right to the free exercise of religion is being made subordinate to the current whims of fancy of those who control the powers of government.

The vast majority of Americans are correct in their intuitive sense that religious liberty has lost significant ground in recent years and that the courts, in general, and the Supreme Court, in particular, no longer share most Americans' conviction that religious liberty should be cherished and protected to the greatest practical extent.

The Religious Freedom Restoration Act was a courageous attempt to rectify an egregious decision by the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*. The *Smith* decision was the worst religious liberty decision handed down by the Supreme Court in my lifetime. Given the fact that the Court's decision strikes down attempts by the Congress through RFRA to rectify the Court's significant restriction of religious liberty in *Smith*, the *Boerne* decision has now dethroned *Smith* as the worst religious liberty decision in my lifetime.

As Justice O'Connor says in her eloquent dissent, the First Amendment's Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: Where a law substantially burdened religiously-motivated conduct \* \* \* we required government to justify that law with a compelling State interest and to use means narrowly tailored to achieve that interest \* \* \* The Court's rejection of this principle in *Smith* has harmed religious liberty."

Justice O'Connor concludes, "The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence."

It is difficult to improve on such straightforward and trenchant prose. The Supreme Court dealt an extremely damaging blow to free exercise, religious liberty rights in *Smith*. When the Congress rectified the Supreme Court's terrible mistake, the Supreme Court surveyed the situation and, having painted the American people into a religious liberty corner in *Smith*, promptly applied a second coat of paint in striking down RFRA in the *Boerne* decision.

Our free exercise rights as American citizens are in peril. The First Amendment's Free Exercise Clause is there to protect all people's religious liberty, particularly those in a minority or vulnerable position. As U.S. Solicitor General Walter Dellinger told this Court during oral arguments, minority religious groups will be discrimi-

nated against pervasively and consistently without RFRA protection.

As a result of the *Smith* decision in 1990, the free exercise of religion must defer to the interests of the government where any rational basis is shown. The practical effect of this is that there is barely any constitutional safeguard against governmental interference in the free exercise of religion.

As the members of this committee are well aware, RFRA passed through Congress and was signed into law with strong bipartisan support. RFRA was based on the simple premise that Congress had every right to afford religious liberty greater protection than what the Constitution provides, as interpreted by this Supreme Court. If the Supreme Court had reviewed RFRA properly, it would simply have asked whether RFRA was constitutional. In other words, it would have asked itself whether RFRA was in any way contrary to the First Amendment's provisions on religion. Had they asked themselves the proper question, they would have reached an entirely different result than they did reach in the *Boerne* case.

The Supreme Court incorrectly focused on the issue of whose right it is to interpret the Constitution. From the Supreme Court's perspective, it was a turf war. However, it is important to note that this is genuinely not an issue of who may interpret the Constitution. The real issue is whether or not it is constitutional for Congress to give greater protection to religious liberty than is provided for in the Constitution, as it is interpreted by this Supreme Court.

The *Boerne* decision was wrong. In effect, Bishop Flores argued that a church has inviolate First Amendment religious protections that cannot be abrogated by the whims and dictates of a municipal government's historic preservation desires. In other words, you cannot treat a church or a mosque or a synagogue the same way you treat a bowling alley or a used car dealership. This Supreme Court, despite eloquent dissent from Justice O'Connor, said, yes, you can. That is outrageous and dangerous.

Congress must respond. The Religious Liberty Protection Act is a good-faith and magnanimous effort at legislation which conforms to the ruling in *Boerne*. RLPA is an attempt to give religious liberty the greatest protection possible, given the framework within which the Supreme Court has given to make that happen.

For some, RLPA is more controversial than RFRA because of its use of the Commerce and Spending Clauses to extend greater protection to religious liberty. Let me be clear that while I may be sympathetic to the concerns of those who object to this legislation on the grounds of anti-federalism, I think that their concerns are misguided in this instance.

The purpose of this legislation is not to empower the Federal Government. The purpose of this legislation is to restrain the use of power of any government which interferes with religious liberty. Admittedly, the Act invokes the power of the Federal Government to extend this protection. However, this is no less true when speaking of invoking the powers of the Federal Government on the basis of the First Amendment. In other words, we should be less concerned about where the Federal Government finds its authority to act than we are concerned with what will be the result if the Federal Government fails to act.

We believe that the anti-federalist argument is not only misguided, but it places a higher value on governmental process than it does upon religious liberty. Greater weight must be given to the precious value of religious liberty than to the value of strictly adhering to a political theory.

I will not attempt to review RLPA. Others will be doing that. I want to close my testimony by again emphasizing how important it is that Congress do everything within its power to respond to the U.S. Supreme Court's decision in *Boerne*. Let me even be more blunt than I have been to this point and state that I believe that the *Boerne* decision is one of the worst decisions rendered by the Supreme Court in its long history. It is consistent with a pattern on the part of this Court to restructure the basic values of our society in a manner consistent with its own set of values and not those prescribed by the Constitution to which it should be bound.

The people I talk to are increasingly aware and increasingly concerned about the scope and power of a Court which is barely accountable to the people. There is a growing sense of frustration over the feeling of powerlessness to respond to a Court which is supposed to understand that it is covenant-bound to protect the original meaning of the original parties to the Constitution of the United States. Failure to respond is to concede to the Supreme Court that any legislation which this Congress passes must not only be consistent with the Court's interpretation of the Constitution, but must also be consistent with the Court's own narrow way of protecting the liberties secured by the Bill of Rights.

The CHAIRMAN. Thank you, Dr. Land.

[The prepared statement of Mr. Land follows:]

#### PREPARED STATEMENT OF RICHARD D. LAND

Thank you for the opportunity to testify on this issue of critical importance to all who cherish religious liberty. As president of the Ethics & Religious Liberty Commission of the Southern Baptist Convention, I am frequently in a position to hear from people across America about their religious liberty concerns. These individuals are not legal scholars. They do not spend their spare moments perusing legal opinions published by our judicial system. They are not familiar with the meaning behind technical legal terms. They do not talk about "strict scrutiny" or "compelling interests" or "least restrictive means." Yet, despite their unfamiliarity with the nuances of a specialized area of the law, they sense that something is fundamentally wrong with the status of religious liberty in our country, particularly when it clashes with the secular interests of government. As government's pervasive influence increases, so does the concern of millions of Americans who sense that their fundamental right to the free exercise of religion is being made subordinate to the current whims of fancy of those who control the powers of government.

The vast majority of Americans are correct in their intuitive sense that religious liberty has lost significant ground in recent years and that the courts in general, and the Supreme Court in particular, no longer share most Americans' conviction that religious liberty should be cherished and protected to the greatest practical extent. The Religious Freedom Restoration Act (RFRA) was a courageous attempt to rectify an egregious decision by the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). The *Smith* decision was the worst religious liberty decision handed down by the Supreme Court in my lifetime. Given the fact that the court's decision strikes down attempts by the Congress (through RFRA) to rectify the court's significant restriction of religious liberty in *Smith* the *Boerne* decision has now dethroned *Smith* as the worst religious liberty decision in my lifetime (51 years).

As Justice O'Connor says in her eloquent dissent, the First Amendment's free-exercise clause:

\* \* \* is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible govern-

mental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: Where a law substantially burdened religiously motivated conduct \* \* \* we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest \* \* \*

The Court's rejection of this principle in *Smith* \* \* \* has harmed religious liberty.

Justice O'Connor concludes that:

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.

It is difficult to improve on such straight-forward and trenchant prose. The Supreme Court dealt an extremely damaging blow to free-exercise, religious-liberty rights in *Smith*. When the Congress rectified the Supreme Court's terrible mistake, the Supreme Court surveyed the situation and, having painted the American people into a religious liberty corner in *Smith*, promptly applied a second coat of paint in striking down RFRA in the *Boerne* decision.

Our free-exercise rights as American citizens are in peril. The First Amendment's free-exercise clause is there to protect all people's religious liberty, particularly those in a minority or vulnerable position. As U.S. Solicitor General Walter Dellinger told this court during oral arguments, minority religious groups will be discriminated against pervasively and consistently with RFRA protection.

As a result of the *Smith* decision in 1990, the free exercise of religion must defer to the interests of the government where any "rational basis" is shown. The practical effect of this is that there is barely any constitutional safeguard against government interference in the free exercise of religion. As the members of this committee are well aware, RFRA passed through Congress and was signed into law with strong bi-partisan support. RFRA was based upon the simple premise that Congress had every right to afford religious liberty greater protection than what the Constitution provides, as interpreted by this Supreme Court. If the Supreme Court had reviewed RFRA properly, it would simply have asked itself whether RFRA was constitutional. In other words, it would have asked itself whether RFRA was in any way contrary to the First Amendment's provisions on religion. Had they asked themselves the proper question, they would have reached an entirely different result than they did reach in the *Boerne* case. The Supreme Court incorrectly focused on the issue of whose right it is to interpret the Constitution. From the Supreme Court's perspective, it was a turf war. However, it is important to note, that this is genuinely not an issue of who may interpret the Constitution. The real issue is whether or not it is constitutional for Congress to give greater protection to religious liberty than is provided for in the Constitution, as interpreted by this Supreme Court.

The *Boerne* decision was wrong. In effect, Bishop Flores argued that a church has inviolate First Amendment religious protections that cannot be abrogated by the whims and dictates of a municipal government's historic preservation desires. In other words, you cannot treat a church or a mosque or a synagogue the same way you treat a bowling alley or a used car dealership. This Supreme Court, despite eloquent dissent from Justice O'Connor, said, "Yes, you can." That is outrageous and dangerous.

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cerned with what will result if the federal government fails to act. We believe that the anti-federalist argument is not only misguided, but it also places a higher value upon governmental process than it does upon religious liberty. Greater weight must be given to the precious value of religious liberty than to the value of strictly adhering to a political theory to which no one is bound.

I will not attempt to review RLPA. Others will be doing that. I want to close my testimony by again emphasizing how important it is that Congress do everything within its power to respond to the U.S. Supreme Court's decision in *Boerne*. Let me be even more blunt than I have been to this point, and state that I believe that the *Boerne* decision is one of the worst decisions rendered by the Supreme Court in its long history. It is consistent with a pattern on the part of this Court to restructure the basic values of our society in a manner consistent with its own set of values and not those prescribed by the Constitution to which it should be bound. The people I talk to are increasingly aware, and increasingly concerned about, the scope and power of a court which is barely accountable to "the people." There is a growing sense of frustration over the feeling of powerlessness to respond to a court which is supposed to understand that it is covenant bound to protect the original meaning of the original parties to the Constitution of the United States. Failure to respond is to concede to the Supreme Court that any legislation which this Congress passes must not only be consistent with the Court's interpretation of the Constitution, but must also be consistent with the Court's own narrow way of protecting the liberties secured by the Bill of Rights.

The CHAIRMAN. Rabbi Zwiebel.

#### STATEMENT OF DAVID ZWIEBEL

Rabbi ZWIEBEL. Thank you very much. Mr. Chairman, distinguished members of the committee, thank you for inviting me here today to express Agudath Israel of America's support for the Religious Liberty Protection Act.

It will come as little surprise to the members of this committee that American Jewry, like virtually every other major faith group in the United States, is hardly monolithic. We differ amongst ourselves on issues of theology, ritual. We debate amongst ourselves and before bodies like this one over questions of public policy and social legislation.

However, on the particular issue before you today, the need to enhance free exercise protection in the United States, the American Jewish community is absolutely unanimous. Little wonder. Jews in the United States are a religious minority. We are, moreover, a people with a history, a long history that has been punctuated by religious persecution in virtually every country we have resided. And so when the Supreme Court handed down its 1990 ruling in the *Smith* case, severely restricting, if not all but eviscerating the constitutional guarantee of free exercise of religion, a chill went up and down the collective American Jewish spine.

Entirely apart from the practical impact of the ruling, which I will return to momentarily, the ruling conveyed a chilling reminder of how fragile are the religious freedoms we had always taken for granted here in the United States. The Court's majority said, "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. But," said the Court, "that is an unavoidable consequence of democratic governments."

Frankly, that was news to us. We had always thought that the freedoms enumerated in the Bill of Rights were designed to protect the vulnerable minority against the intended or unintended tyranny of the majority. We had always understood, as the Supreme Court stated in the *Wisconsin v. Yoder* case in 1972, that the Free

Exercise Clause embodied a fundamental right and that, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

The Court in *Smith* told us we were wrong, and we trembled. And then last year the Court in *Boerne* told us that Congress had exceeded its constitutional power in enacting the Religious Freedom Restoration Act, and we were shaken.

For those in the Jewish community who are religiously observant, the cumulative impact of *Smith* and *Boerne* is potentially devastating. There are many contexts in which laws of general applicability could substantially burden the practice of Judaism and where the State could easily accommodate the religious practice without sacrificing any compelling governmental interest. Let me cite three broad areas to illustrate the point.

The first is the one that has been discussed at length today and at earlier hearings, which is land use regulation. In a certain way, our community has a very special stake in this issue. Orthodox Jews are prohibited from driving on the Sabbath or on Jewish holidays. They are also directed to join in communal prayer. Taken together, these two religious obligations make it necessary for an Orthodox Jew to live within walking distance of a synagogue. Zoning laws that make it impossible, or virtually impossible, to build houses of worship within residential areas thus have the practical impact of excluding Orthodox Jews from those areas.

Over the past decade or two, as our community has grown and moved into new neighborhoods across this country, we have witnessed numerous instances where battles have been waged over the implementation of neutral land use laws that substantially burden our community's religious practice. Indeed, there have been some cases and some evidence that at least in some situations, local municipalities invoke land use restrictions for the specific purpose of keeping Orthodox Jews out. They know they can't put signs out in the backyard saying "Orthodox Jews not welcome," and so they do the next best thing, create zoning laws that make it next to impossible to build synagogues.

In the absence of meaningful free exercise protection, and in the absence of a willingness on the part of local communities to accommodate the needs of Orthodox Jews for local houses of worship, we will be effectively locked out of many neighborhoods across this great land.

A second area that is impacted by *Smith* and *Boerne* is the area of religious ritual practice. The right of an observant Jew in a government-controlled facility to observe the Sabbath, to wear a yarmulke, to receive kosher food, the right of observant Jewish medical practitioners to abstain from performing medical procedures they may deem religiously objectionable, the right of Jewish decedents to be free from religiously prohibited routine autopsies—these are just a few examples where our community's ability to practice its religion is jeopardized by the absence of meaningful free exercise protection.

I will cite a dramatic example which had a happy ending, but I think illustrates the point well. A few years ago, the U.S. Department of Agriculture proposed new meat and poultry processing regulations designed to reduce harmful bacterial pathogens, such as

salmonella and E. coli, in poultry and livestock products. We reviewed the draft regulations and we concluded that two of the proposed rules could create serious problems for the religiously mandated salting and soaking process necessary to render meat kosher. So application of these neutral laws of general applicability could have made it impossible for observant Jews to eat meat or poultry processed in the United States.

Fortunately, when we brought this problem to the attention of Secretary Glickman, he and his staff displayed great sensitivity to the problem, and the ultimate regulations that were developed, the final regulations, were sensitive to our concerns. They were amended to avoid the kosher problem without in any way compromising the safety issue, and so this story happens to have a happy ending.

However, these types of conflicts arise all the time. Mr. Chairman, you spoke before about the blind bureaucratic behemoth that characterizes our modern-day society, and not always are we so fortunate as to deal with bureaucrats who are sensitive to and willing to accommodate our religious needs.

The third area that I would like to bring to the committee's attention relates to the rights of religious schools and institutions. Again, focusing on the Jewish community which is my particular area of expertise, Jewish schools, known as yeshivas, rabbinical schools, ordain men only. The sexes are maintained separately in Jewish houses of worship, in Orthodox synagogues.

Many of the Orthodox Jewish schools, even at the elementary and secondary level, are single-sex institutions as a matter of religious principle. Across-the-board application of generally applicable civil rights provisions could, in certain cases, render Jewish institutions vulnerable to claims of sex discrimination.

Now, it is true that many statutes that prohibit sex discrimination, including, for example, title IX, contain built-in exemptions for religious organizations. Some, however, do not. An example of this occurred recently when a religiously sponsored vocational training school which had a vocational training component to its school received JTPA funds and was told by the U.S. Department of Labor that ultimately they needed to integrate their classes, despite the fact that their own religion required them to maintain separate classes.

The provisions of title IX that exempt religious institutions from the prohibition against sex discrimination where it would violate their tenets to integrate the classes was deemed not applicable to the specific context of the JTPA—in our view, a wrong reading of the law, but nonetheless again a bureaucratic interpretation of a particular section of the law which has impacted in a negative way on the exercise of religious freedom. And so if religious institutions are to maintain their distinctive religious identities and to carry out their distinctive religious mandate, they need to have more meaningful free exercise protection.

These are but a few examples of why it is so important for Congress once again to step into the free exercise breach created by the Supreme Court. The Religious Liberty Protection Act gives Congress an opportunity to do so and its enactment, while not as sweeping as the Religious Freedom Restoration Act, will go a long way toward reassuring American Jews and Americans of all faiths

that government will not lightly interfere with their religious practice.

Thank you.

The CHAIRMAN. Thank you, Rabbi. It is interesting to note that at the time when Secretary Glickman acted very reasonably on the kosher meat and poultry issue that he was acting under the Religious Freedom Restoration Act which, of course, is still operative federally.

Rabbi ZWIEBEL. That is correct.

The CHAIRMAN. But that doesn't take care of the situations that are non-Federal.

Rabbi ZWIEBEL. Well, it is speculation as to how he might have acted were the RFRA not in force at the time. But more to the point, even—

The CHAIRMAN. I think he would have been reasonable anyway, but I am saying that I think that it was interesting—

Rabbi ZWIEBEL. Ultimately, if we need to rely on the whims and the goodwill of bureaucrats, then sometimes we will win and sometimes we will lose.

The CHAIRMAN. Right. They might not be reasonable.

Rabbi ZWIEBEL. Right.

The CHAIRMAN. And that is the point.

[The prepared statement of Rabbi Zwiebel follows:]

#### PREPARED STATEMENT OF RABBI DAVID ZWIEBEL

Mr. Chairman, distinguished members of the committee, my name is David Zwiebel. I am an ordained rabbi, and I serve as director of government affairs and general counsel for Agudath Israel of America, the nation's largest grassroots Orthodox Jewish organization. It is my pleasure to offer Agudath Israel of America's enthusiastic support for the Religious Liberty Protection Act of 1998, and to explain why this bill is so important to the American Jewish community.

It will come as little surprise to this committee that American Jewry, like virtually every other major faith group in the United States, is hardly monolithic. We differ amongst ourselves on issues of theology and ritual. We debate amongst ourselves—and often before lawmaking bodies like this one—over questions of public policy and social legislation. However, on the particular issue before you today—the need for legislation to protect the free exercise of religion—the Jewish community is absolutely unanimous. No fewer than 20 national Jewish organizations, spanning the full ideological spectrum of Jewish life across the United States, have joined with numerous other religious and civil liberties groups in the Coalition for the Free Exercise of Religion to promote legislation along the lines of the Religious Liberty Protection Act.

Little wonder. Jews in the United States are a religious minority in a predominantly Christian nation. We are, moreover, a people whose long history has been punctuated by religious persecution in virtually every country we have resided. And so, when the Supreme Court handed down its 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), severely restricting if not all but eviscerating the constitutional guarantee of free exercise of religion, a chill went up and down the collective American Jewish spine.

Entirely apart from the practical implications of the Court's ruling—some of which I will return to momentarily—the *Smith* decision conveyed a chilling reminder of how flimsy and fragile are the religious freedoms we had always taken for granted in the United States. In the words of the Court's majority (494 U.S. at 890):

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required \* \* \*

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government \* \* \*

Frankly, that had not been our understanding. We had always thought that the freedoms enumerated in the Bill of Rights were designed to protect the vulnerable minority from the tyrannical majority. We had always assumed that the freedom to practice one's religion according to the dictates of one's conscience was one of the bedrock principles upon which this great nation was founded. We had always understood that, as the Supreme Court stated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Free Exercise Clause embodied a "fundamental right," and that "only those in the interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215, 216.

The Court in *Smith* told us we were wrong—and we trembled. And then last year the Court in *Boerne v. Flores*, 117 S.Ct. 2157 (1997), told us that Congress had exceeded its constitutional power in responding to *Smith* by enacting the Religious Freedom Restoration Act—and we were shaken.

For those of us in the Jewish community who are religiously observant, the cumulative impact of *Smith* and *Boerne* is potentially devastating. There are many contexts in which laws of general applicability could substantially burden the practice of Judaism, and where the state could easily accommodate the religious practice without sacrificing a compelling governmental interest. Let me cite three broad areas that illustrate the problem:

**Land Use Regulation:** Orthodox Jews are prohibited from driving on the Sabbath or on Holidays. They are also directed to join together in communal prayer. Taken together, these two requirements of religious law make it necessary for Orthodox Jews to live within walking distance of a synagogue. Zoning laws that make it impossible or exceedingly difficult to build houses of worship within residential areas thus have the practical impact of excluding Orthodox Jews from those areas.

Thus, over the past decade or two, as the Orthodox Jewish population has grown and moved into new neighborhoods across the United States, we have witnessed numerous instances where battles have been waged over the implementation of neutral land use laws that substantially burden our community's religious practice. Indeed, there is some evidence that at least in certain cases local municipalities invoke land use restrictions for the specific purpose of keeping Orthodox Jews out. See, e.g., *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995). In the absence of meaningful free exercise protection, and in the absence of a willingness on the part of local communities to accommodate the needs of Orthodox Jews for local houses of worship, our community will be effectively locked out of many neighborhoods across this great land.

**Religious Ritual Practices:** Secular laws of general applicability often impact upon various aspects of Jewish ritual observance. The right of an observant Jew in a government controlled facility to observe the Sabbath, wear a yarmulke, or receive kosher food; the right of observant Jewish medical practitioners to abstain from performing abortions, sterilizations or other medical procedures they may deem religiously objectionable; the right of Jewish decedents to be free from religiously prohibited routine post-mortem procedures—these are just a few examples where our community's ability to practice its religion is jeopardized by the absence of meaningful free exercise protection.

A dramatic example of the type of problem that can arise occurred several years ago when the U.S. Department of Agriculture proposed new meat and poultry processing regulations designed to reduce harmful bacterial pathogens such as salmonella and E-coli in poultry and livestock products. A careful review of the draft regulations led us to conclude that two of the proposed rules could create serious problems for the religiously mandated salting and soaking process necessary to render meat kosher. Application of these neutral laws of general applicability could thus have made it impossible for observant Jews to eat meat or poultry processed in the United States.

Fortunately, when we brought this problem to the attention of the USDA, Secretary Glickman and his staff displayed great sensitivity to our concerns and amended the final regulations in a manner that avoided the kosher problem without compromising the safety issue. The bottom line, therefore, was a happy outcome for religious freedom. However, these types of conflicts arise all the time, and not always are we so fortunate as to deal with bureaucrats who are sensitive to and willing to accommodate our religious needs. In those circumstances, the absence of meaningful free exercise protection renders our community exceedingly vulnerable.

**Discrimination:** The egalitarian ideal of modern secular society is occasionally at odds with Orthodox Jewish practice. Consider, for example, the issue of sex discrimination. Rabbinical schools in the Orthodox community ordain men only. The sexes are separate during prayer services in Orthodox synagogues. Many of the Orthodox Jewish schools, even at the elementary and secondary level, are single sex institutions. Across the board application of generally applicable civil rights provi-

sions could, in many cases, render Jewish institutions vulnerable to claims of sex discrimination.

It is true that many of the statutes that prohibit sex discrimination contain built-in exemptions for religious organizations. Some, however, do not. If Orthodox Jewish institutions are to maintain their distinctive religious identities, and carry out their distinctive religious mandate, they may find it necessary to rely on meaningful free exercise protection.

These are but a few examples of why it is so important for Congress once again to step into the free exercise breach created by the Supreme Court. The Religious Liberty Protection Act represents a good faith effort to abide by the Supreme Court's guidelines governing the exercise of congressional power in this area; and, while it does not sweep as broadly as the Religious Freedom Restoration Act, its enactment will go a long way toward reassuring American Jews—and Americans of all other faiths—that government will not lightly interfere with their religious practice.

Thank you very much.

The CHAIRMAN. Mr. Mincberg, we are honored to have you here. We look forward to your testimony.

### STATEMENT OF ELLIOT M. MINCBERG

Mr. MINCBERG. Thank you very much, Mr. Chairman and members of the committee, for inviting me to testify before the committee today on the important subject of the Religious Liberty Protection Act.

As the chairman noted, my organization, People for the American Way, is vitally concerned with protecting and promoting religious liberty throughout the United States. To help serve that mission, I have served, for example, on the Committee on Religious Liberty of the National Council of Churches, and also on the committee that has offered drafting suggestions to this Congress of the Coalition for the Free Exercise of Religion, an organization of more than 80 religious and civil liberties groups which has supported RLPA, as well as the Religious Freedom Restoration Act.

For 8 years, this remarkable coalition has been headquartered at the Baptist Joint Committee on Public Affairs and has been ably and tirelessly led by Buzz Thomas and Brent Walker, of the Baptist Joint Committee. This coalition includes members, frankly, who seldom agree with each other on anything—People for the American Way and the Southern Baptist Convention, Americans United for Separation of Church and State and the National Association of Evangelicals. But we are all united in supporting the Religious Liberty Protection Act and in thanking Chairman Hatch and Senator Kennedy for their tremendous leadership on this issue.

In our view, RLPA is needed to help restore the protection against substantial and unnecessary burdens on the free exercise of religion that had existed for decades until the Supreme Court's decision in *Smith* in 1990. Now, as the chairman suggested, we are not suggesting that government is systematically hostile to or discriminatory against religion, although discrimination does sometimes occur. But protection for free exercise against substantial and unnecessary burdens is important to ensure religious liberty and true neutrality by government toward religion.

Now, the principle of religious liberty and government neutrality toward religion is enshrined in the First Amendment's twin guarantees against government interference with the free exercise of religion and against government establishment of religion. But some-

times true neutrality means that religion must be treated a little bit differently than other activities.

For example, with respect to Establishment Clause values, consider the Equal Access Act, which I know Chairman Hatch was one of the prime sponsors of. Under the Act, if a middle or high school permits a chess club or a political club, unrelated to the curriculum, to meet, it must also permit a religious club to meet. But even though a paid public school teacher can be asked to guide and to participate substantively in the activities of a chess club, for example, the Act specifically provides that teachers or other school employees can be present at a religious club only in a non-participatory capacity. That avoids the perception or the reality of government promotion or sponsorship of sectarian religious activity that would violate religious liberty. It preserves true neutrality, even though religion may be treated a little bit differently than non-religious activities.

Similarly, on the free exercise side of the coin, religion is also sometimes treated a little bit differently to ensure true neutrality. Take, for example, the fact that Congress has recognized that principle in providing for an exemption for religious institutions from the anti-discrimination provisions of title VII of the 1964 Civil Rights Act, an exemption that doesn't apply to non-religious organizations.

This principle was also recognized by free exercise jurisprudence prior to 1990. As the Supreme Court had held for decades, where a government practice had imposed a substantial burden on the free exercise of religion, even if the law or practice was neutral on its face, it could not be applied to religious free exercise unless it was necessary to do so in order to promote a compelling governmental interest.

Unfortunately, as has been testified before, the Supreme Court changed that rule in its 1990 decision in the *Smith* case. I am constrained to note that that decision was written by one of the most conservative members of the Supreme Court, Justice Scalia, but both conservatives and liberals alike have joined in criticizing that decision.

The CHAIRMAN. You had to rub it in, didn't you, Elliot? [Laughter.]

Mr. MINCBERG. I am sorry, Mr. Chairman. I couldn't resist that one.

The CHAIRMAN. That is all right. I don't blame you. I felt the same way.

Mr. MINCBERG. But the important point is that, as has been noted, the result of that decision led a virtually unanimous Congress, backed by President Clinton, backed by religious and civil liberties groups across the spectrum, to support and to enact the Religious Freedom Restoration Act.

Unfortunately, just last year, in *City of Boerne v. Flores*, the Supreme Court ruled that Congress did not have the power to enact RFRA, as applied to State and local governments. And I want to underline, Mr. Chairman, what you said. As far as we are concerned, the Act does still apply to the Federal Government. But that has led us to where we are today and the need for RLP.

RLPA seeks to partially restore the compelling interest test with respect to State and local government laws and practices that substantially burden religion and to provide similar protections within the authority clearly possessed by Congress. It would restore the compelling interest test with respect to religious practices that are in or affect commerce among the States, or are substantially burdened in a government program or activity receiving Federal financial assistance. These provisions are justified by Congress' authority under the Commerce Clause and under the Spending Clause.

RLPA also relies on Congress' authority under section 5 of the 14th Amendment in a manner totally consistent with *Boerne*. Section 3(a) essentially codifies and is consistent with the protection for religious liberty under the Free Exercise Clause. Section 3(b) concerning land use results from extensive congressional hearings and fact-finding, and reflects the conclusion that although government officials dealing with land use are for the most part tolerant and respectful of religious rights, serious problems do sometimes occur.

Particularly where religious minorities are involved, free exercise has been burdened and intentional discrimination against religion has played a significant role. Where it does occur, however, such discrimination is often difficult to detect and prove. The standards of section 3(b) of the law which apply only to land use decisions are a targeted and justified attempt by Congress to address these types of problems which remain within Congress' power after *Boerne*.

Now, I should note, as Senator Kennedy did, that RLPA does not mean that all religious claimants will win their cases, far from it. Some have won, some have lost under the Free Exercise Clause and under RFRA. The courts have reached different results, and members of the coalition disagree on how specific cases should come out, whether it is on land use, civil rights, or a range of other areas. But the key is the standard of review, the substantial burden-governmental interest test. The authors of this bill have wisely not attempted to define this or change it or pre-determine the outcome in any cases, but to restore a standard that can protect religious liberty.

We welcome additional testimony and input on RLPA. We look forward to continuing to work with Chairman Hatch and Senator Kennedy and others on a truly bipartisan basis to seek to protect religious liberty through this measure.

Thank you very much.

[The prepared statement of Mr. Minberg follows:]

PREPARED STATEMENT OF ELLIOT M. MINCBERG

Thank you very much for inviting me to testify before this Committee today on the important subject of the proposed Religious Liberty Protection Act. I am vice-president and legal director of People For the American Way, a non-partisan citizens' organization with over 300,000 members vitally concerned with protecting and promoting religious liberty. This includes both the right of individuals to the free exercise of their religion and the right to be free from improper government coercion or promotion of religious activity. I have been extensively involved in litigation and legislation relating to these issues, and have advised parents, teachers, religious leaders, school districts, and religious organizations on these subjects, including serving on the Committee on Religious Liberty of the National Council of Churches.

People For the American Way is a member of the Coalition for the Free Exercise of Religion, an organization of more than 80 religious and civil liberties groups which has supported RLPA as well as the Religious Freedom Restoration Act. For

8 years, this remarkable Coalition has been headquartered at the Baptist Joint Committee on Public Affairs and has been ably and tirelessly led by Buzz Thomas and Brent Walker of the Baptist Joint Committee. The Coalition includes members who seldom agree with each other on anything, ranging from Americans United for Separation of Church and State to the National Association of Evangelicals. We are all united, however, in supporting the Religious Liberty Protection Act and in thanking Chairman Hatch and Senator Kennedy for their leadership on this issue. Letters from the Coalition and many of its member organizations supporting RLPA are enclosed with my testimony.

RLPA is needed to help restore the protection against substantial and unnecessary burdens on the free exercise of religion that had existed for decades until the Supreme Court's decision in *Employment Division v. Smith* in 1990. We are not suggesting that government is systematically hostile to or discriminatory against religion, although discrimination does sometimes occur. But protection for free exercise of religion against substantial and unnecessary burdens by government is important to ensure religious liberty and true neutrality by government towards religion.

The principle of religious liberty and government neutrality towards religion is enshrined in the First Amendment's twin guarantees against government interference with the free exercise of religion and against government establishment of religion. Sometimes, however, true neutrality means that religion must be treated a little differently. For example, with respect to Establishment Clause values, consider the Equal Access Act, passed by Congress in 1984. Under the Act, if a middle or high school permits a chess club or a political club unrelated to the curriculum to meet, it must also permit a religious club to meet. But even though a paid public school teacher could be asked to guide and participate substantively in the activities of a chess club, the Act specifically provides that teachers or other school employees can be present at a religious club meeting "only in a nonparticipatory capacity," 20 U.S.C. 4071(c)(3). That avoids the perception or reality of government promotion or sponsorship of sectarian religious activity that would violate religious liberty. It preserves true neutrality even though religion may be treated a little differently than non-religious activities.

Similarly, on the Free Exercise Clause side of the coin, religion is also sometimes treated a little differently to ensure true neutrality. Congress has recognized that principle in providing for an exemption for religious institutions from the anti-discrimination provisions of Title VII of the 1964 Civil Rights Act, an exemption upheld by the Supreme Court. This principle was also recognized by free exercise jurisprudence prior to 1990. As the Supreme Court had held, where a government practice or law imposed a substantial burden on the free exercise of religion, even if the law or practice was neutral on its face, it could not be applied to religious free exercise unless it was necessary to do so in order to promote a compelling government interest. For example, a town could decide to prohibit the consumption of alcohol, but would need to prove a compelling interest in order to apply that prohibition to a church that used wine in conjunction with communion.

Unfortunately, the Supreme Court changed that rule in its 1990 decision in the *Smith* case. After *Smith*, a government rule substantially burdening free exercise can be challenged under the First Amendment only if it can be shown that it specifically targets religion. Facially neutral laws that substantially burden religion, like the Prohibition hypothetical I just mentioned, cannot be challenged under the Free Exercise Clause. A virtually unanimous Congress, backed by President Clinton and by religious and civil liberties advocates across the spectrum, sought to restore the compelling interest rule as a matter of statutory law through the Religious Freedom Restoration Act (RFRA). But just last year, in *City of Boerne v. Flores*, the Supreme Court ruled that Congress did not have the power to enact RFRA as applied to state and local governments.

That has led us to where we are today, and to the proposed Religious Liberty Protection Act (RLPA). RLPA seeks to partially restore the compelling interest test with respect to government laws and practices that substantially burden religion, and to provide similar protections, within the authority clearly possessed by Congress. It would restore the compelling interest test with respect to religious practices that are in or affect commerce among the states or are substantially burdened in a government program or activity receiving federal financial assistance. These provisions are justified by Congress' authority under the Commerce Clause and the Spending Clause.

RLPA also relies on Congress' authority under Section 5 of the Fourteenth Amendment, in a manner totally consistent with the Court's decision in *Boerne*. Section 3(a) is intended essentially to codify and is consistent with the existing protections for religious liberty under the Free Exercise Clause. Section 3(b), concerning land use, results from extensive Congressional hearings and fact-finding. It reflects

the conclusion that although government officials dealing with land use issues are, for the most part, tolerant and respectful of religious rights, serious problems do sometimes occur. Particularly where religious minorities are involved, free exercise of religion has been substantially burdened and intentional religious discrimination has played a significant role. Where it does occur, however, such discrimination is often very difficult to detect and to prove. The standards suggested in Section 3(b), which apply only to land use decisions, are a carefully targeted and justified attempt by Congress to address these types of problems, which remain within Congress' power even after *Boerne*.

We welcome additional testimony and input on RLPA, and we look forward to continuing to work with Chairman Hatch and Senator Kennedy and their colleagues on a truly bipartisan basis to seek to protect religious liberty through this important measure. Thank you very much.

The CHAIRMAN. Well, thank you. We have really appreciated the cooperation in working together because we have brought together, as we did with the Religious Freedom Restoration Act, a broad array of differing viewpoints and studies with regard to religious freedom. We particularly appreciate all four of you being here today because I think we have covered the waterfront, so to speak.

We have a vote on, so that is why I asked Senator Durbin to go and vote and come back as soon as he can, and also the other two Republican Senators who were here. So I am going to ask my questions now.

Let me just start with you, Elder Oaks. In the *Boerne* opinion, the Supreme Court stated with respect to the hearing record on the Religious Freedom Restoration Act that, "The history of persecution in this country detailed in the hearings"—that is, on RFRA—"mentions no episodes occurring in the past 40 years."

Now, I am going to ask each of you this. How do each of you react to that statement, and could you each take a few moments and give us a few specific details or examples of problems encountered by believers or of religious liberties put at risk without this legislation? We will start with you, Elder Oaks.

Elder Oaks. Mr. Chairman, thank you. We tried to build a temple in the city of Forest Hills, Tennessee. In the last 12 months, we had the culmination of the process come about, and I think it responds to your question. When we determined that a temple should be built in that city, we looked for a suitable site and found that there were no sites available with the appropriate designation for a church structure.

We therefore selected an appropriate site and petitioned the city of Forest Hills for a zoning change. From the land use planning point of view, the site was ideally located. Several years before, it had been occupied by a church and it actually stood adjoining to or across the street from three other churches of different denominations. And the specifications which the church submitted for its new temple were within the specifications of the other religious buildings already existing within city limits.

Despite these facts, the city rejected the church's petition for a zoning change, making clear that it would not approve any site for a temple within the city because the city leaders believed that another church building would detract from the city's aesthetics and would lead to increased traffic in whatever location might be approved.

Left without any real choice in the matter, we went to court claiming the city's decision not to allow an L.D.S. temple within its

boundaries violated free exercise. The judge's decision, issued in January of 1998, illustrates the problem that this legislation seeks to correct. She concluded, exactly as the church had feared, that, "The city adopted ER zoning districts to better control the development of religious use within the city," that there was no property in the city zoned ER on which the church can construct a temple, and that the city's refusal to rezone the particular site was, "essentially aesthetic to maintain a suburban estate character of the city."

Now, within these findings, the church argued strenuously to the judge that she must apply the strict scrutiny analysis. However, she simply could not get past the generally applicable and neutral test established in *Smith*. The intent of the city, the court concluded, was, "not directed to restricting the right of an individual to practice their religion. The intent was to regulate the use of the city's land." This example is quite comparable to the example and circumstance the rabbi discussed a few moments ago.

Now, I want to make one thing clear, Mr. Chairman. We know of no definitive evidence showing that the city officials in Forest Hills intentionally engaged in religious discrimination against our church. That, however, is exactly the problem. If we had that direct evidence, we could go to court.

But the difficulty is that direct prejudice is impossible to prove in all but the most unusual cases. A city is free, or a zoning authority is free to close its doors to new churches while allowing established churches to operate within its boundaries, and can cite standards that one cannot get behind unless we have the kind of standard that the Religious Liberty Protection Act seeks to enact.

The CHAIRMAN. Thank you.

Dr. Land.

Mr. LAND. Thank you, Senator. I would first of all go to the *Boerne* case, which I think is a classic example of the fact that we believe that the First Amendment gives protection to religious institutions and to religious practice that are not applicable to other areas of commerce or a bowling alley or a used car dealership, and that those trump historic preservation wishes of a municipal court.

And then I would also cite my good friend, Chuck Colson, and his prison fellowship ministry. He has told me personally that, without RFRA, it would be very difficult and had been increasingly difficult to continue the ministry that they have in the prisons. In fact, as far as I know, the best guarantee against a prisoner returning to prison is if he finds religious faith to which he can commit himself while he is in prison.

Yet, Mr. Colson has told me repeatedly that they encountered difficulties from prison officials who would just say, well, it is just too much trouble to allow this Bible study, or it is just too much trouble to provide this opportunity for mass for the Catholic part of the prison population. Without the protections of RFRA and without the protections of a compelling state interest standard, then there is really no redress for that.

Solicitor General Walter Dellinger said there were several hundred pages that he had in his office of people that had applied for relief under RFRA because they were feeling this discrimination and the lack of protection they had prior to *Smith*, and when RFRA

was passed, they were appealing for protection under it. So I just think the Supreme Court is either unaware or doesn't see the forest for the trees.

The CHAIRMAN. Or is ignoring the actual illustrations.

Rabbi, I think you can give us a lot of them, can't you?

Rabbi Zwiebel. Well, I think that if the majority opinion in *Boerne* was unable to find examples of discrimination on the basis of religious or where it was necessary for a religious practitioner to rely upon free exercise protection over the past 40 years—if that record was not before Congress when Congress enacted the Religious Freedom Restoration Act, it was certainly before the courts.

There have been numerous cases that have been decided in the courts under the Free Exercise Clause. When RFRA was enacted, in fact, there were hundreds of cases over the several years in which RFRA was in effect in which the statutory free exercise provisions of RFRA were relied upon in a conflict between a religious practitioner and a governmental agency. So I think there is an ample record of instances where it is necessary to rely upon free exercise protection to safeguard people's individual religious freedoms.

I have here an interesting document dated December 12, 1997, which was pulled off the E mail from the deputy commissioner of the New York State Department of Correctional Services, and I will just read the first two paragraphs which illustrate the point as well.

"As you are all aware," he writes, "because of a lawsuit that was premised on the Religious Freedom Restoration Act, Directive 4914 was modified to allow exemptions to the requirement that inmates could not allow beards or mustaches to exceed 1 inch in length. Specifically, a certain section was modified to permit those inmates to apply for exemptions who are documented members of a religion that had legitimate religious tenets against the trimming of beards or mustaches. This included but was not limited to Rastafarians, Orthodox Jews, and Muslims. Accordingly, a number of inmates who met this criteria have been issued exemptions which have been filed in their legal folder and which allow them to grow their beards and mustaches in excess of 1 inch."

"As you are also aware," the memo continues, "the U.S. Supreme Court recently declared RFRA to be unconstitutional. The lawsuit mentioned above contained a provision which, in essence, provides that the settlement could be set aside if RFRA were found to be unconstitutional. Thus, the department will restore Directive 4914 to the version which existed prior to the settlement of the RFRA lawsuit."

As a result of this change in policy, we now have situations where religiously observant inmates in the New York State correctional system—and this may be going on in other correctional facilities as well—are prohibited from growing their beards in accordance with their religious tenets beyond just the 1-inch requirement. Very clearly, that change in policy came about as a result of the Supreme Court's ruling in *Boerne* and of the absence of meaningful free exercise protection. I think it is a very striking example of how this can make a real difference in the real world to people of religious faith.

The CHAIRMAN. I can list a number of illustrations where I have personally helped the Jewish community resolve various difficulties and problems. I remember when the L.D.S. faith was building a temple in Massachusetts, there was a lot of uproar. People weren't real happy about it in the neighborhood, but gradually as it became built, and it is a beautiful facility, the neighbors seem to have rallied around and have accepted it and been very happy with it.

Is that a fair appraisal of that?

Elder OAKS. Yes. And, of course, the proposed legislation doesn't reach the opinions of neighbors and their legal attempts to make sure that temples or any other religious structure measure up to whatever the criteria is in the neighborhood on height restrictions, and so on.

We don't have a quarrel with that, but when you try to locate a new facility and there is a vague standard applied to exclude it, we are worried that unless religion has its constitutional sanctuary, the vague standards that necessarily operate in the area of land use can be used for religious discrimination, even though it can't be proved.

The CHAIRMAN. Right.

Elliot. Now, I am going to have to leave in just a minute. I am going to wait for about another minute and then I am going to have to leave.

Mr. MINCBERG. I think I can answer in that period of time. I don't think the *Boerne* Court was entirely correct in its assessment of the record with respect to RFRA, but it is very clear that we have taken the Court's admonition to heart and the record with respect to RLPA is replete, both on the House side and now additionally on the Senate side, with examples of the need for that kind of legislation; for example, a loyalty oath serving as a pre-condition of government employment of a community college causing a crisis of conscience for a Jehovah's Witness who wants the job, but whose faith instructs against the taking of such oaths; the autopsy cases that you mention.

In particular, the record is very clear in the area of land use, which is the area that we are relying on section 5 of the 14th Amendment, that there is indeed sometimes intentional discrimination with respect particularly to minority faiths, and that the kinds of standards in section 5 are an appropriate prophylactic method to do something about that.

The CHAIRMAN. Well, thank you all. I have other questions and I will either submit them in writing or ask them when I get back. I have to run to vote, but this has been compelling and very interesting to me.

Now, Senator Durbin is here. We will turn the dais over to him for 7 minutes. Senator Durbin, you can take longer if we don't have a Republican here. But when they get here, if you will turn to the Republican and give me enough time to get back, we won't recess as long as we can go back and forth, and then I will come back as soon as I can.

I have really been very impressed with the testimony here today and I appreciate all of you. I will be back.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator DURBIN [presiding]. Thank you, Mr. Chairman. I want to thank this panel. This is an interesting week in the Senate Judiciary Committee because here on Tuesday, we will discuss the First Amendment to the Constitution in relation to the free exercise of religion and consider legislation which will, in fact, enshrine and protect that freedom even in areas of controversy. Then in a day or two, we will consider an amendment to the Constitution which would limit the right of free speech in America.

But that is the nature of this political process. We tend to zig and zag, and I would like to, if I can, explore what I consider to be a fascinating issue here in light of the bill that is before us and the decision of the Supreme Court.

First, it is a curious political issue to bring together Senator Hatch and Senator Kennedy, the ACLU, and some very conservative religious groups, and others, and to have at this same table People for the American Way and some others who may not see eye to eye with that organization on anything else. But allow me, if I can, for a moment to kind of ask some pointed questions about the application of this law, questions which I think, if he were here today, Justice Scalia would ask, questions which were raised in his decision.

I think it is a fairly easy case to resolve in our minds that there should not be discrimination against religion and the free exercise thereof in such things as zoning laws. In my State of Illinois, and in the city of Chicago, there is evidence that that occurred. When a church sought a zoning permit in a certain area of the city, they were denied that, for a variety of reasons—the loss of tax revenue, the controversy that religion involved, the number of cars parked on a Sunday, and on and on and on.

But, it strikes me that that is a good and compelling illustration of why this law is needed and that there should, in fact, be neutrality and the demand that government come up with some compelling interest to treat churches or religions differently than other establishments.

But the case at hand and the one that has been referred to, the *Smith* case—and I hope I characterize this correctly, and I defer to the panel because I know there are more experts on the panel than myself. The *Employment Division v. Smith* case out of the State of Oregon was a different circumstance. It involved, if I am not mistaken, two individuals who belonged to a religion—I believe it was characterized as the Native American Church—which believed under their religion that they could use peyote, a hallucinogenic narcotic, the use of which was criminal under Oregon law—that they could use this peyote in the exercise of their religion and that they were protected to do so.

Then when it was discovered and they were fired from their jobs and denied unemployment compensation, it gave rise to the case. The argument was made by the State of Oregon that they broke the law. The law says you can't use narcotics, whether you are in a church or outside. And that, I think, has brought us here today, or at least started this argument down the line.

I am interested in whether or not anyone on the panel would like to comment. With the passage of this law, the RLPA law, how would that have affected the decision of the State of Oregon to deny unemployment compensation to these two individuals?

Mr. LAND. Senator, I would like to respond to that. I agree with Justice O'Connor's response, in which she disagreed with Justice Scalia. Basically, as I remember Justice O'Connor's opinion, she said that she would have ruled to fire the two employees, to uphold the firing, because the State does have a compelling State interest in controlling illicit substances.

But Justice Scalia in his decision said that the State didn't have to prove a compelling State interest. She said that under the standard that was in force before *Smith* that the court could just as easily have ruled that there is a compelling State interest in controlling illicit substances. But what the court did was substantially lower the standard at which time a government entity could infringe on free exercise rights, and she argued that the standard should still have remained at the compelling State interest level and that even under that standard that the State could have ruled as it ruled. I agree with that.

I think the State does have a compelling interest in controlling illicit substances and that that case would have met that standard. And what this attempts to do, as I understand it, and RFRA, is to reassert the compelling State interest standard that was eviscerated by Justice Scalia's opinion.

Mr. MINCBERG. Senator, if I can add to that briefly, I think it reinforces the point I was making a few minutes ago that just because you enact RFRA or RLPA doesn't mean that religious claimants are always going to win. Indeed, many can and do lose, and Justice O'Connor clearly would have voted on the merits the same way Justice Scalia did. But how you get there is very important, and applying the standard of compelling governmental interest is the key, in that it is the constitutional standard.

In case I don't get another chance to say it, I want to commend you, Senator, for your full support of the Constitution, including the free expression part with respect to the markup that will occur later this week on that subject.

Senator DURBIN. It is a good thing you said it while the chairman was gone.

Mr. MINCBERG. I thought it was a safe time, Senator.

Senator DURBIN. Mr. Mincberg, you in your testimony said something that draws—I want to go to more specific examples here because I want the record clear as to how each member of the panel feels on hypotheticals that I am going to pose to them. But you even said in your testimony here, true neutrality means religion must be treated differently.

Mr. MINCBERG. Sometimes.

Senator DURBIN. Which suggests to me that it is not neutrality we are seeking, but a preferred position when it comes to religion.

Mr. MINCBERG. Well, I would not say that. I mean, it is the difference between what some people have called facial neutrality and substantive neutrality. If you treat religion the same on its face, which is what Justice Scalia's opinion would do, you can argue that that is neutral. But, in fact, from a substantive point of view, it is

not neutral because what it does is it disadvantages the free exercise of religion when it bumps up against the State.

And as I pointed out, both on the Free Exercise Clause and on the Establishment Clause side of the ledger, sometimes you treat religion a little bit differently. That is why, in our view, for example, vouchers are unconstitutional because you don't treat religion exactly the same as everything else. You sometimes treat it a little bit differently in order to ensure that government is not burdening free exercise or promoting the exercise of religion in an improper way.

Senator DURBIN. Rabbi Zwiebel—am I pronouncing your name correctly?

Rabbi ZWIEBEL. I will answer to anything.

Senator DURBIN. Let me give you a hypothetical.

Rabbi ZWIEBEL. Please.

Senator DURBIN. Let's take a notorious hate group like the Ku Klux Klan and assume for a moment that they decided to become a religion and to continue spreading their venomous doctrines and anti-Semitic and anti-immigrant jargon in the name of religion. Does this law that we are considering give them protections which they don't otherwise have today?

Rabbi ZWIEBEL. Well, it is not that much of a hypothetical, Senator. In fact, there are religious groups, groups that I guess are sincere in their beliefs, that, in fact, harbor beliefs that are offensive, perhaps even dangerous.

Again, I go back to what Dr. Land said earlier and to what Mr. Minberg said. The issue here under this legislation is not to mandate the results of any particular dispute that may arise between a sincerely held religious belief and the expression of that belief through practice, on the one hand, and the governmental interest on the other hand. But it is to tell government that if you seek in some way to tell a person that he or she cannot practice their sincerely held religious beliefs, you better have a very good reason to do that.

Senator DURBIN. Using that example—and Scalia gets to this point. He says if you are going to argue that it is central to your faith, central to your religious belief, that you be allowed to have a march in Skokie, IL, for example, and anti-Semitic slogans, are you being given now more protection with this law than you currently have?

Rabbi ZWIEBEL. I think the answer to that is yes in a certain sense. I mean, there are free speech issues involved there as well as free religious exercise issues. There may be greater protection in the sense that the lawyer for the Skokie marchers may have another section to write in his brief about the Religious Liberty Protection Act.

But in my view, again, certainly if I am a lawyer on the other side of the issue and sought to take the position that the permit ought to be denied in that particular instance, I would argue that there is a compelling governmental interest in preventing a hate group from marching through a neighborhood which may well react in certain ways that could only endanger the public safety and peace.

So, again, the analysis that ought to be applied to that type of situation, to the extent that there is a—again, I emphasize the phrase “sincerely held religious belief,” which is a critical issue. You can’t just make up a tenet and say, well, this is now my religion. There has to be some evidence of sincerity of belief, which the courts grapple with and it is obviously a difficult question.

But once you cross the threshold of sincerity of belief and an action based on that sincerity of belief, then I do believe it is appropriate in all circumstances to ask government, including the circumstance that you posit—to ask government to come up with a mighty good reason, a compelling governmental interest. In my opinion, the Skokie example happens to present a situation which, in my view—and I am not sure that everybody on the panel would agree—there would be a compelling governmental interest on the other side of the equation.

Mr. MINCBERG. Senator, could I—

Senator DURBIN. Sure, go ahead.

Mr. MINCBERG. All I wanted to say is that I am not sure with Rabbi Zwiebel on this because I don’t think it would make very much difference in the hypothetical you talk about whether the group had a religious motivation or not. The Nazis in Skokie did not claim free exercise rights, purely free speech rights, and I don’t think RLPA would give a religious group any greater protection than the Free Speech Clause of the First Amendment already gives them.

I know the situation very well. My parents lived in Skokie at the time. I do agree with the result the court reached in that case and I don’t think that there was a compelling governmental interest in that particular case.

Senator DURBIN. I want to move in my hypotheticals beyond speech because, clearly, we have an overlap here and an interesting thing. But, first, Elder Oaks, if you would like to comment?

Elder OAKS. If I may, I would like to move from Skokie to Mundelein, IL, but keep it within your jurisdiction, Senator.

Senator DURBIN. All Bulls fans. Sorry to bring that up.

Elder OAKS. Another illustration that could be given is an ordinance of the city of Mundelein, IL, which is general legislation on door-to-door contacting, and that legislation has inhibited Mormon missionaries from going door to door. That ordinance has been applied to require registration by missionaries and to limit the hours within which they could go door to door with their message.

Now, the problem with that ordinance is not that cities don’t have a legitimate interest in regulating that kind of activity, but they are regulating missionaries the same way they regulate vacuum cleaner salesmen. And if we could separate in our mind and give a preferred position, without apology, to religious free speech, if we can call it that, or to religious exercise, then we would understand what I believe this legislation is trying to do.

It is trying to take religion from the public square, from a regulatory apparatus that is applied to business and to every other activity, and to recognize the sanctuary that the Constitution gives it.

Senator DURBIN. So, clearly, you are not in search of neutrality when it comes to government action, but rather to give to the exercise religion a preferred position.

Elder OAKS. That is the way I would state the issue. I think the Framers of the Constitution were not in search of neutrality when they put in a provision in the First Amendment, and likewise a provision saying there shall be no religious test for public office.

Senator DURBIN. Let me take that to the next level before my colleagues have a chance here, and let us assume that a religion is opposed to war, as some are, and the decision is made by that religion that its adherents will not pay taxes because that supports the Defense Department and military activity and the promulgation of war, in their view. How would you respond to that? Is that a situation where, because it is a religious belief, they should be given any special treatment?

Elder OAKS. I think they should be considered for special treatment. Whether the outcome gives them an immunity from a particular legislation is submitted to the compelling governmental interest test. But what this legislation should provide is that religion and religious exercise has a preferred position to be examined against a higher standard than mere governmental convenience. It is compelling governmental interest.

Mr. LAND. Senator, if I could just add that in all of the hypotheticals you have raised, the answer I would give is that this legislation would in no way give any stronger argument than any group had prior to 1990 in the *Smith* decision. All this is really trying to do is, within the scope the Supreme Court has given us, to try to undo the damage that was done by the *Smith* decision which undid a compelling State interest test that had been in existence for 30 years and has served us very well and had proved by the State on numerous occasions.

Senator DURBIN. I am going to close because my colleagues are here, but I want to make it clear where I stand on this issue. First, by way of background, my mother was an immigrant to this country and came from Lithuania, and her mother smuggled into this country a Roman Catholic prayer book which was prohibited to be used in Lithuania when they came over. I have always remembered that as one of the things she was willing to take a risk in bringing to the United States. It says a lot about her, it says a lot about our country and what we stand for.

Also, I want to make certain that I understand the length and breadth of this law and whether it is conferring new rights on individuals which can be asserted in the name of religion because I think that is what Justice Scalia argued, that if we are going to make this a question of sincerity or the centrality of personal belief, it really makes it a very difficult standard for us to legislate and to adjudicate.

I will close by thanking you all for joining us. It has been fascinating.

Senator DeWine, I believe you are next.

Senator DEWINE. I have no questions. Thank you very much.

Senator DURBIN. Senator Sessions.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM  
THE STATE OF ALABAMA**

Senator SESSIONS. Well, this is a fascinating discussion and I appreciate it very, very much. Respect for religion and the First Amendment, which gives a priority, I think, to religious expression, means that the government can't violate a church doctrine without a compelling interest, a real interest, because we have a real respect for religion. That was what this Nation was founded on, it seems to me.

I am glad to see that the People for the American Way also agree with me that the Supreme Court can make errors in religious doctrine cases that they have made, and I think they have made a number over the years. It just seems to me we have become too legalistic. It seems to me, we ought to just act with freedom and naturalness and courtesy and respect and those kinds of values. And if a group of school children wants to have a minute in school before they begin the day with a little prayer, why does the 82nd Airborne have to be called in to stop it? It just doesn't seem to me that that is the establishment of a religion.

I am also frustrated with the failure of so many in America to recognize that it is the Constitution we are about, and the Constitution simply says at the beginning of the First Amendment that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. And this wall of separation, this obsession with eliminating every expression of religious faith in the public sphere is not constitutional and is not historical. It is a recent creation, in my view. However, that goes beyond this subject we are discussing here today.

But I wanted to compliment the chairman and Senator Kennedy and all of you because I think this legislation is narrowly crafted to deal with a specific problem, and does so effectively. I sense that it would be difficult to suggest that it goes too far, but it deals precisely with that issue.

Elder Oaks, looking at what Justice O'Connor said in the *Boerne* case, "The Free Exercise Clause is not simply an anti-discrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible government interference, even when such conduct conflicts with neutral generally applicable law."

So we are saying openly—I think I agree with you, and I think Justice O'Connor does—we are saying that church activities do deserve some heightened respect. Would you agree?

Elder OAKS. I surely do. I think that is the whole point of the Constitution. If the free speech guarantee was sufficient, why put in free exercise and anti-establishment?

Senator SESSIONS. And with regard to the Baptist and the Mormon faith, evangelism is an important historical part of that and a deeply held view of your churches?

Elder OAKS. As we understand it, that is an imperative on all Christians. We interpret it a little differently among different denominations, but that is a Christian imperative stated by the Savior.

Senator SESSIONS. Go into the world?

Elder OAKS. Yes.

Senator SESSIONS. So with regard to a brush salesman and a church evangelist, the courts ought to look at those with some difference. Would you agree with that?

Elder OAKS. Absolutely, and that does not mean that there is no governmental basis to forbid religions or to regulate them, but it means they need to be looked at differently. One needs to be looked at in a sanctuary created by the Constitution; the other is in the public square.

Senator SESSIONS. Mr. Mincborg, I know you were a little uncertain and this is a delicate issue. Would you disagree with that?

Mr. MINCBERG. I am not sure that I would disagree. I go back to what Dr. Land said before, which is that the key is the application of the compelling government interest test. In the *Mundelein* hypothetical, it may well be that the government does have a compelling interest to stop both brush salesmen and religious proselytizers from knocking on people's doors after 7:00 p.m. at night. They may well have that compelling governmental interest.

But as I said in my testimony, sometimes to assure true neutrality and true protection for religion, you do look at religion a little bit differently on both sides of the coin. We might disagree on that part, Senator. I mean, I suspect that while—

Senator SESSIONS. Yes, I would.

Mr. MINCBERG [continuing]. You and I would agree that Justice Scalia gets it wrong on the Free Exercise Clause, we might not agree that he gets it wrong on the establishment side of the coin as well. But I do think that on both sides of the coin, sometimes you look at religion a little bit differently in order to fully protect true government neutrality toward religion, again restoring the test that existed prior to 1990.

Senator SESSIONS. Well, the only concern I would have about that insight is it seems to me that it has been translated into the notion that you can be more restrictive on religious expression than you are on other forms of expression. You can have chess clubs, but not religious clubs.

Mr. MINCBERG. No, we have never said that.

Senator SESSIONS. A valedictorian address can talk about math or evolution, but it can't talk about creation and the Creator. So I think we have gone from neutrality—and I think a good case can be made that there is in this land a bit of hostility against religion.

Senator DURBIN. Would the Senator yield?

Senator SESSIONS. Yes, sir.

Senator DURBIN. If I could ask you to consider this, because before you returned I asked some hypotheticals and one of them in the *Smith* decision, *Olone v. State of Shabazz*, involved a case where a prison refused to excuse inmates from work requirements to attend worship services. I would like to know what you think about that decision and how that applies to your logic about standing in the way of religion.

Senator SESSIONS. Well, I think the work release center has the right to establish reasonable rules, but it seems to me that if you had a group of people on the work release who believed that at noon everyday they should have a prayer, they ought to stop what

they are doing and let them have a prayer, you know, unless it disrupts totally the whole process. We don't need a court to be rendering decrees on that. People need to be courteous to people's— I was taught to respect people's religion, whether it agreed with mine or not, and I think that is the great American heritage to respect people's faith, and we have gotten too legalistic about it, it seems to me.

Mr. MINCBERG. Senator, if I could just respond briefly to your question and comment?

Senator SESSIONS. All right.

Mr. MINCBERG. From our perspective, true voluntary prayer, for example, in public schools by individual students already is permitted. But when we talk about government, in the person of a teacher or a principal, getting behind religious practice and promoting a particular religious practice, that is also, in our view, where neutrality is questioned.

Senator SESSIONS. Well, let me ask you about that. In a home-room class, if a group of kids want to have 2 minutes to acknowledge that there is something more important in that day than what their grade is, do you oppose that or do you support that?

Mr. MINCBERG. I would have a problem with that, Senator.

Senator SESSIONS. I thought you would, even if the teacher didn't have anything to do with it.

Mr. MINCBERG. Let me tell you why, because if you are talking about after class is in session, maybe some of the kids want to get together and say something about the Creator. But there may be one quiet kid that doesn't particularly want to do that—

Senator SESSIONS. They don't have to participate.

Mr. MINCBERG [continuing]. And doesn't want to have the situation where, on compulsory government time, that occurs. Now, they can get together 5 minutes before class starts in the playground or right outside class or in an equal access act club and truly on their own do what they want to do, and I don't see why that isn't sufficient.

Senator SESSIONS. Well, I just wanted to point out that you do not favor it, and People for the American Way is confusing the issue deliberately, in my opinion, to suggest you favor voluntary expression in school by kids as long as they are not led by teachers. That is not the position you are taking and that is not the position the courts are taking right now.

Mr. MINCBERG. Senator, it has never been our contention that that is the position we are taking.

Senator SESSIONS. What you suggested, I think, tried to confuse the issue a bit. There is a clearer issue to that.

Mr. MINCBERG. Not at all. What we have talked about—

Senator SESSIONS. Do you believe that a valedictorian can talk about their personal religious experience in a valedictory address?

Mr. MINCBERG. Sometimes, actually, Senator, you will be surprised to learn that we do think that can occur—

Senator SESSIONS. Some of the courts have ruled against that.

Mr. MINCBERG [continuing]. If the valedictorian is chosen on a sufficiently neutral basis in the appropriate way. But if, on the other hand, the school says, OK, we are going to pick somebody and you can decide whether or not you want to have a prayer, that,

I think, biases things in a way from the perspective of a government that isn't appropriate.

Senator SESSIONS. Well, I think we do need to be courteous. When you have the floor at a function, you ought to be respectful of all persons, but I don't think the Constitution requires the kind of elimination of religious expression from all public life that some suggest.

I am glad the chairman is back to save me.

The CHAIRMAN. I don't know how good a savior I am, but we will do our best.

Mr. LAND. Mr. Chairman, if I could go back to a question that Senator Durbin had asked in a couple of different ways, I am not going to speak for the rest of the panel, but as far as we are concerned, as Southern Baptists we believe that the law should seek to have neutrality as applied among religions; that the State should not give favor to any one faith over others and should try to be neutral in guaranteeing a neutral and a level playing field. But that is not the case when it is religion versus secular activities.

I think the practical effect of the *Smith* decision and the practical effect of the *Boerne* decision is the Court is saying, yes, you can treat a church the way you treat a bowling alley and subject it to the same generally applicable laws that you would a bowling alley or a used car dealership. That is a fundamental evisceration of the Free Exercise Clause of the First Amendment which clearly states that there is a constitutional protection to religious free exercise that is not granted to general commerce.

The CHAIRMAN. Now, be careful. We want to keep all the bowlers on our side.

Mr. MINCBERG. We don't disagree with that.

The CHAIRMAN. I am just kidding.

Senator Grassley.

Senator GRASSLEY. Thank you. I am going to put a statement in the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman, I know that we are addressing the topic of religious freedom in general today, but I wanted to make a few comments on the specific topic of tithing and bankruptcy. As you may know, last Friday, President Clinton signed into law "The Religious Liberty and Charitable Donations Protection Act," a bill which I introduced last year after the National Bankruptcy Review Commission rejected a similar proposal.

Mr. Chairman, the bill which was signed into law last Friday and which you co-sponsored gave churches around the country a new and badly-needed measure of protection against a serious threat to religious freedom.

Before the enactment of my bill, churches were told that tithing was an act of fraud and that churches had to return money given as a tithe when a parishioner declares bankruptcy. And, what's even worse, bankruptcy judges actually told people of faith that they couldn't tithe if they wanted to reorganize their personal financial affairs in chapter 13 bankruptcies. But these same judges said you could budget money for entertainment, such as movies or dining out.

Clearly, this was a frontal assault on religious freedom by unelected bankruptcy judges and overzealous bankruptcy trustees.

Thankfully, Congress and the President came together in a bi-partisan way to protect the constitutional rights of the American people.

With your leadership, Mr. Chairman, I hope we come together again to provide comprehensive protection for religious freedom.

Senator GRASSLEY. I would start with some questions on that portion of the Hatch-Kennedy bill that prohibits recipients of Federal financial assistance from substantially burdening a person's religious practice. From your point of view, what does the phrase "Federal financial assistance" mean? Is the phrase intended to cover indirect financial assistance where no money changes hands, but where the Federal Government would provide favorable tax treatment, like, for instance, with municipal bonds being tax-free, as a financial benefit of the bond market for a municipality? Does the favorable tax treatment of municipal bonds constitute Federal financial assistance within the meaning of S. 2148 such that the bond issuer's actions are subject to the restrictions listed there?

Mr. MINCBERG. Senator, I think, in general, the phrase is meant to mean basically what it means with respect to Title VI of the 1964 Civil Rights Act, for example, under which I believe, although I am perfectly willing to stand corrected, that simply favorable tax treatment would not constitute Federal financial assistance.

Rabbi ZWIEBEL. I would just say at this point, Senator, I don't know the specific answer to your question and I don't consider myself a scholar of the Spending Clause of the Constitution, and perhaps the next panel may be able to address that more specifically. But I believe that the point of tying this to Congress' spending power is to respond in some way to the Supreme Court's ruling in *Boerne* that Congress exceeded its authority when it passed the Religious Freedom Restoration Act.

So in presenting this more targeted legislation, more narrowly drawn legislation, I would imagine that it would be coextensive with Congress' power under the spending provisions of the Constitution to regulate the activities of institutions that receive those funds. So we would look to the case law, I would imagine, under the spending authority that Congress has to determine what might be deemed Federal financial assistance for purposes of this legislation. That is what I would think.

Senator GRASSLEY. At least from your point of view, you are satisfied that the legislation should not apply to tax incentives, as opposed to spending?

Rabbi ZWIEBEL. I do not think it would, Senator, although I would be willing to stand corrected if—

Senator GRASSLEY. From the standpoint of your own philosophical approach to the legislation, are you satisfied that it only applies to the spending—

Rabbi ZWIEBEL. To actual spending, yes, that is my understanding of the way the Spending Clause has been construed.

Mr. LAND. Senator Grassley, I would agree with that. I am not a lawyer nor the son of a lawyer, a judge nor the son of a judge, but I would hope that it would not apply. But I am not going to predict what courts have done or will do, but I would not think that tax incentives—philosophically, I would not include tax incentives in that.

Senator GRASSLEY. Well, then, could any of you follow that up with whether or not—from the standpoint of the bill saying that recipients of Federal financial assistance can't substantially burden religious practice, can any of you give examples of non-substantial burdens of religious practice which wouldn't violate S. 2148?

Mr. MINCBERG. Well, Senator, one way to do that would be to go back to free exercise jurisprudence as it existed prior to 1990. There were a number of cases where the courts found, even though religious claimants raised claims, that they didn't really suffer a substantial burden, and I think those would be reliable guides to that.

Senator GRASSLEY. Do any of the rest of you have a view on what you would not want to be a burden to religious practice?

Elder OAKS. Senator, as I understand the proposed legislation, it is seeking to operate within a very complex matrix of legal laws and practices and experiences, and to make as few changes as possible, but fitting the readjustment that has been discussed here within an existing system of precedent and experience. So I just reaffirm what the other witnesses have said on this issue. It should not be presumed that the legislation is seeking to change anything other than what it expressly states an intention to change. In all other respects, it is trying to feather into the existing structure of precedent and law, as interpreted in the past.

Senator GRASSLEY. Could any of you comment how this legislation will affect prisoner lawsuits or the Prison Litigation Reform Act?

Mr. MINCBERG. There is a provision in the bill, if I am not mistaken, that says that it is still subject to the Prison Litigation Reform Act, I believe.

Elder OAKS. Yes. The short answer is that it says specifically it is intended to make no effect on that.

Senator GRASSLEY. And that would be your support of that position?

Elder OAKS. Yes. That is a further illustration of the description I gave earlier.

Senator GRASSLEY. Is that true of all of you on the panel?

Each of you has nodded your head yes.

I thank you. I have no further questions.

The CHAIRMAN. Well, thank you.

Senator DURBIN. Can I have one follow-up?

The CHAIRMAN. Yes, go ahead, and then I would like to ask one.

Senator DURBIN. I would like to ask the panel—and I know you are all familiar with the *Smith* decision, but there was one particular part where Justice Scalia and Justice O'Connor were hitting head to head on what they called the parade of horrors. In this part of the decision, Justice Scalia specifies about eight or 10 specific instances where people have asserted religious belief as justification for not being held accountable under certain laws and they included compulsory military service, payment of taxes, compulsory vaccinations, drug laws, traffic laws, minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

They had an exchange there as to whether—Justice O'Connor was arguing, well, the court made that decision; the court said in each case there was a compelling government interest. And Justice Scalia was suggesting, yes, but if you go the next step and ask us to judge it by the plaintiff, by the sincerity question, by the centrality of belief, you put the courts in an impossible situation.

Is there any feeling on this panel that of those things that I have listed, those cases that have been brought before the court, that it wouldn't be a clear case where there is a compelling government interest which would supersede any assertion of religious belief, even under this new statute?

Mr. MINCBERG. Again, I think, as I think most of the panel has agreed, there is no intent here to change anything in terms of the compelling governmental interest test. As both Scalia and O'Connor agreed, the courts had found compelling interests in all of the cases that you refer to, Senator, and we have no reason to believe that those cases would come out any differently under RLPA.

Some of them, I should add, RLPA wouldn't even apply to because RLPA is more limited than RFRA was or than the Free Exercise Clause, as interpreted prior to 1990, is.

The CHAIRMAN. But that still doesn't negate the necessity of having the government show a compelling interest. Even though we have some wacko cases, the courts have found compelling interest where they should.

Mr. MINCBERG. And that really was the case Justice O'Connor made that you can achieve the result in the *Smith* case or in the cases that Senator Durbin referred to without abandoning the test that provides a very important safeguard for religious free exercise.

Elder OAKS. I would like to agree with that and simply say that as I understand the legislation that I have stated support for on behalf of my church, this legislation seeks a restoration, not a revolution.

Mr. LAND. I would say it seeks a limited restoration within the parameters that the Supreme Court has allowed because I think Elliot is right that this law, if it is passed, will not result in a restoration of the status quo ante of the *Smith* decision. But Justice O'Connor, in referring to the *Boerne* decision, said that before *Smith* our free exercise cases were generally in keeping with this idea where a law substantially burdening religiously-motivated conduct will require government to justify that law with a compelling State interest and to use means narrowly tailored to achieve that interest. The Court's rejection of this principle in *Smith* has harmed religious liberty.

To be quite blunt about it, I think that Justice Scalia just flat failed to comprehend what the lowering of this State standard or this government standard for overriding a person's free exercise rights—the effect it would have particularly on minority religious groups. I think it is a blind spot. We all have them. I think it is a blind spot and I thought that Justice O'Connor did everything she could within the bounds of Court etiquette to point that out to him.

The CHAIRMAN. Let me just say—

Rabbi ZWIEBEL. Mr. Chairman.

The CHAIRMAN. Go ahead.

Rabbi ZWIEBEL. I just wanted the record to be clear what I meant when I nodded my head to your question, Senator Grassley, that no impact on the Prison Litigation Reform Act—that is not to say that this bill will have no impact on people who are in correctional facilities across this country.

Again, to the extent that prison authorities seek in some way to inhibit their religious practice, we believe the bill does give prisoners the right to put the prison authorities to the compelling interest test. Of course, the types of frivolous actions that the Prison Litigation Reform Act is designed to get at would not in any way be affected by this bill. And as my colleagues have pointed out, that is spelled out specifically in the language of the legislation.

But at the same time, it does, I believe, create at least the potential for religiously-motivated prisoners to assert their rights in circumstances where the State has less than a compelling interest, even within the prison context, to inhibit their religious practice.

The CHAIRMAN. Well, let me just say that I think this panel has been very good. I loved the comment that you made, Elder Oaks, and you added to, Dr. Lamb, and that is that this is a restoration, not a revolution. It is a restoration of rights that have always existed up until *Smith*.

You say a limited restoration of rights because this bill isn't as broad as the Religious Freedom Restoration Act was, and I still believe that it was constitutional. I think the Court just got it wrong. That is all there is to it. When you have that kind of a broad spectrum of agreement from the left to the right in this country, it is really something.

With regard to prison litigation, very similar in some respects, I have had judge after judge tell me that since we passed the Prison Litigation Reform Act they have resolved many, many more problems than ever before, and in a better way. They have, by and large, gotten rid of the really frivolous litigation. I suspect that this is going to have the same effect.

I would like each of you to submit to the committee, if you will—and I think it is worthwhile for you to do—I would like you to explain how important RFRA was in negotiating accommodations outside of litigation. I would like you to give us as many illustrations as you can of that and how important the enactment of RLPA will be in similarly resolving disputes outside of the courtroom.

The advantage of knowing where we stand from a religious freedom standpoint and from a free exercise standpoint is that we will be able to solve a lot of societal problems without ever going to court, where now we have a much too much litigious society. That is the value of the Prison Litigation Reform Act which we on this committee worked so hard to pass because we were just proliferated with frivolous suits. Frankly, the prison appeals or cases have dropped by one-third in the first year that that law was in effect.

Now, we suspect that there will be a lot less of this hiding behind the right to order religions around if this bill passes, and we believe it will pass, and it is going to pass, I think, because of the help that you have all brought to us today. So if you will supplement your testimonies today with those illustrations, I think it will help us a great deal. You are in a position, each of you, representing wide diversities of people, to really help us to make the case for this bill.

I think we have approached it right. I think we have done it right. Now, you can certainly feel free to have your answers supplemented with further examples for the written record, and we will

leave it open for any such filings. So if you can, supplement as much as you can and help us to make the case here so that when we get to the floor, people will realize that this is well thought through and that it isn't quite the same as the Religious Freedom Restoration Act, which I happen to think was one of the most important bills ever passed by Congress, but it will suffice for now if we get it passed.

So I want to thank each of you for being here. You have been great witnesses and we appreciate it.

Mr. LAND. Thank you for having us.

The CHAIRMAN. More than you know, we appreciate it. Thank you.

Our first witness for panel two will be Professor Douglas Laycock. I apologize to you, Doug, for giving you the wrong name when I came in.

Professor Laycock holds the Alice McKean Young Regents Chair in Law at the University of Texas. He has studied, taught, and written about a wide range of constitutional issues, with emphasis on religious liberty, for more than 20 years. Professor Laycock has represented both religious and secular civil liberties organizations, including the churches in *City of Boerne v. Flores* and in *Lukumi Babalu Aye, Inc. v. City of Hialeah*.

Following Professor Laycock, we will hear from Professor Marci A. Hamilton. Professor Hamilton is a professor of law at Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in constitutional and copyright law. She has written and lectured extensively in these fields, including several articles on the Religious Freedom Restoration Act and on the decision in *City of Boerne v. Flores*. Professor Hamilton was lead counsel for the City of Boerne in that case.

We will then hear from Professor Christopher L. Eisgruber, who is a professor of law at the New York University School of Law. He has coauthored many scholarly articles, including several dealing with the Religious Freedom Restoration Act and the decision in *City of Boerne v. Flores*.

Our final witness on panel two will be Professor Michael McConnell. He is Presidential Professor at the University of Utah College of Law, having been a tenured professor at the University of Chicago Law School. So we feel very honored to have him in Utah, and it seems like we have got some real good University of Chicago law professors here today. We appreciate it, but we are also glad to have you in our home State. Professor McConnell has taught and written extensively regarding the First Amendment and religious liberty. He wrote an amicus curiae brief to the Supreme Court in support of the Religious Freedom Restoration Act in *City of Boerne v. Flores* and has argued numerous religious liberty cases before the Supreme Court.

We are honored to have all four of you here today. We will start with you, Professor Laycock, and we will just go right across the—

Senator GRASSLEY. Mr. Chairman, could I recognize Professor Laycock and thank him for the work that he did to help us with very successful passage of the tithing bankruptcy bill.

The CHAIRMAN. Yes, I would like to recognize you as well. Even though I called you by the wrong name, I know who you are.

Senator GRASSLEY. And that bill was signed by the President just last Friday.

The CHAIRMAN. Right. That was a very important piece of legislation out of this committee and I want to compliment Senator Grassley for having pushed it so hard, and also you, Professor Laycock, for your sterling testimony.

So we will turn to you at this time.

**PANEL CONSISTING OF DOUGLAS LAYCOCK, ALICE McKEAN YOUNG REGENTS CHAIR IN LAW, UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW, AUSTIN, TX; MARCI A. HAMILTON, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NY; CHRISTOPHER L. EISGRUBER, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY; AND MICHAEL W. McCONNELL, PRESIDENTIAL PROFESSOR OF LAW, UNIVERSITY OF UTAH COLLEGE OF LAW, SALT LAKE CITY, UT**

#### **STATEMENT OF DOUGLAS LAYCOCK**

Mr. LAYCOCK. Thank you, Mr. Chairman, members of the committee. I am very honored to be here to urge enactment of S. 2148. I think when the Senate passed the Religious Freedom Restoration Act, 97 to 3, it made up its mind that this sort of legislation is needed.

I would like to say just a little bit about some of the conceptual questions that were raised in the prior panel. The theory of this bill is indeed that the right to the free exercise of religion is a substantive right. You actually have a right to practice your religion and not merely to believe in it.

But I think it is also the case that this bill is fairly described as preserving an important form of governmental neutrality toward religion. The substantive right to practice and neutrality are consistent. Obviously, not neutrality in the sense that a religious activity will be treated exactly like a secular activity—there is a constitutional right to exercise religion, but not a constitutional right necessarily to run a vacuum cleaner factory—but neutrality in the sense that government should not encourage people to adopt a religion or religious practice and government should not discourage people from adopting a religion or a religious practice.

If the regulatory state says, if you do what your religion teaches you to do, you will go to jail or you will be fined, you will be denied an occupational license, you will not be able to continue in this school, that is a powerful, powerful discouragement of religion and an enormous departure from neutrality.

In most cases, when the government grants an exemption, accommodates the religious practice, lets the individual exercise his religion, and lets the government program go forward with that exemption, there is no encouragement. Few people run out and—you know, when Captain Goldman won his yarmulke case, there was not a sudden wave of yarmulkes in the military. People adopt religious practices when they believe in them and not merely because the government says we won't send you to jail if you do it.

There will be hard cases under this bill. There will be cases that are not hard when you look at them, but that are politically unattractive when you summarize them at the sound bite level. The dispute over peyote in the *Smith* case has, in fact, been resolved in legislation both here and in Oregon. And when Congress looked at it carefully, they said the actual practice that was going on in that church was not dangerous or harmful.

The Nazi case is protected by the Free Speech Clause. The tax resister cases have all been rejected because the incentive to false claims there is just overwhelming. The system has been able to deal with those difficult or unattractive sounding cases. Don't let a focus on those cases dispel the many, many examples of clearly religious practices that are doing no significant harm to anybody that are being seriously burdened or discouraged by governmental regulation that you have heard about in this hearing and the earlier hearing last summer and on the House side.

We are going to hear today that this bill is wildly and flagrantly unconstitutional, and I would like to anticipate some of that. Most of this bill tracks settled constitutional powers. The Spending Clause provisions are based on Title VI of the Civil Rights Act and Title IX which prohibits sex discrimination in financially-assisted educational programs.

The purpose of these spending programs is to ensure that the intended beneficiaries of the Federal financial assistance are not excluded from the assisted program by unnecessary burdens on their religious exercise, and that Federal funds are not spent contrary to Congress' intent in ways that unnecessarily burden religious exercise. Those purposes are at the very core of the power to attach conditions to the grant of Federal funds and I am confident of the validity of the Spending Clause provisions.

The Commerce Clause provisions track the language of many familiar statutes—the Clayton Act, the Federal Trade Commission Act, the Americans With Disabilities Act. “In or affecting commerce” is the historical constitutional standard. This statute cannot be unconstitutional in its Commerce Clause applications. It goes as far as the Constitution permits and no further.

Last term, in a little-noticed case called *Camps Newfound/Owatonna*, the Supreme Court held that a small religiously-run camp affected interstate commerce. The entire entity was protected by the dormant Commerce Clause and the rule that you aggregate many small but similar transactions applied to not-for-profit, religiously-motivated commerce. I think the Commerce Clause provisions will have a wide range of applications. On the House side, Mark Stern and the American Jewish Committee have submitted testimony showing literally billions of dollars in commerce by religious organizations.

Section 3 is a provision to enforce the 14th Amendment. Section 3(a) would enforce the Free Exercise Clause, as interpreted by the Supreme Court. There are important parts of *Employment Division v. Smith* that actually protect the free exercise of religion when the law is not neutral and generally applicable, most importantly. But each of those exceptions to the *Smith* standard poses difficult questions of intent or of classification. The proof is often elusive, the truth is uncertain, and the evidence is typically in the hands of the

governmental agency. By shifting the burden of persuasion, section 3(a) would protect religious liberty in uncertain cases where the case for suppression is not proven.

Section 3(b) would impose prophylactic rules on church land use regulation. Both Houses have heard overwhelming evidence that land use regulation is administered in individual processes with ample opportunity for discrimination, and that there is often discrimination especially against small and non-mainstream churches, and sometimes against any church.

I want to supplement that record by describing a recent survey conducted by the Presbyterian Church USA. They surveyed their congregations. They are not a rapidly growing denomination, but even so some 2,000 of their churches had required a land use permit in the last 5 years. In 47 percent of those cases, there was no generally applicable rule. In 47 percent of the land use cases, the entire decision was made in a wholly individualized process, such as an application for a special use permit.

In 18 percent of those cases, the Presbyterians, who are about as well-connected and mainstream as anybody, experienced significant conflict with the zoning authorities or a cost increase of more than 10 percent because of additional requirements laid on by the land use authorities. That is 60 to 80 Presbyterian churches per year having a significant land use conflict.

Now, we don't know the facts of all those cases. Sometimes the church might have been wrong-headed, sometimes the land use authorities. But there are two striking things about that. Those conflicts were conducted in the absence of generally applicable rules, and in the Brigham Young study that Elder Oaks described there are only two reported cases involving a Presbyterian church in the history of the reporter system.

Now, we know that reported appellate cases are the tip of the iceberg, but this shows you just how tiny that tip is. There are two reported cases in a century, but there are 60 to 80 actual significant conflicts in that denomination every year. They also found in 1 percent of the cases there was a clearly stated rule that prevented what the church wanted to do and that applied only to churches, seemingly a flagrant violation of *Smith*.

Then when you read that study in light of the Brigham Young study, if Presbyterians are having significant conflict in 18 percent of the cases and we know the minority churches like Jehovah's Witnesses and the Jewish community are widely overrepresented in the reported cases, it is a reasonable inference that they are also overrepresented in the cases that don't reach litigation and that they have been having trouble in much more than 18 percent of the cases.

Finally, you have to read this in light of Gallup poll evidence. Forty-five percent of the population reports unfavorable or highly unfavorable views of Evangelicals. Eighty-six percent of the population reports unfavorable or highly unfavorable views of religious culture sects, which was not defined. Those very widespread negative attitudes toward people who take their religion more seriously than the norm presumably are shared by 45 percent or more of government officials as well, who use land use authorities with no generally applicable rule in half the cases, with virtually total dis-

cretion to say you are approved or you are not approved because of aesthetics or the general welfare or incremental effect on traffic. They can, and the evidence is they do act on those negative attitudes not in nearly all the cases, but in far too many cases.

Finally, let me say a little about not the sources of power for this legislation, but other constitutional objections to it. You may hear that it will violate the Establishment Clause. RLPA does not violate the Establishment Clause by eliminating substantial burdens on the exercise of religion. That is the trigger in the statute. There has to be a substantial burden, and the Court has unanimously held that Congress can exempt religious exercise from burdensome legislation and that those exemptions need not come packaged with similar benefits for secular activities. They said that unanimously in the *Amos* case in 1987 and they reaffirmed it, after *Smith*, in 1994 in *Board of Education v. Grumet*.

Similarly, RLPA does not violate the federalism limitations on Congress' power. It declares a Federal policy that religious exercise should not be unnecessarily burdened. It is, in effect, a religion deregulation act, and it preempts State laws inconsistent with that policy. That is what it does. Hundreds of Federal statutes do that.

The structure of the Commerce and Spending Clause provisions, even the effect of those provisions, even the syntax of those provisions, is strikingly parallel to the Airline Deregulation Act, which is another statute that says we don't want much regulation here, and to make sure this works the States can't regulate it either. And I set those two provisions out side by side toward the end of my written testimony.

The Supreme Court in its most recent federalism decision, *U.S. v. Printz*, reaffirmed the validity of this kind of preemptive legislation, citing earlier decisions such as *Hodel v. Virginia* and *FERC v. Mississippi* that, in fact, were much more intrusive on State regulatory processes than this would be, but were designed as preemption provisions and were upheld.

A lot of people have spent a lot of time thinking about how to do this bill. It won't reach all the cases that RFRA would have reached, but it will reach a lot and it will be constitutional under existing law.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Professor Laycock.

[The prepared statement of Mr. Laycock follows:]

#### PREPARED STATEMENT OF DOUGLAS LAYCOCK

Thank you for the opportunity to testify this morning in support of S. 2148 the Religious Liberty Protection Act of 1998. This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

I have taught and written about the law of religious liberty, and also about a wide range of other constitutional issues, for more than twenty years. I have represented both religious organizations and secular civil liberties organizations; I represented the churches in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). I wish to address Congress's constitutional authority to enact RLPA, the range of cases to which the bill might be applied, and some of the drafting choices presented by the bill. I also wish to describe a recent Presbyterian study of church land use regulation.

But first let me say a little about the importance and universality of this bill. RLPA is not a bill for left or right, or for any particular faith, or any particular tra-

dition or faction within a faith. There is an extraordinary diversity of beliefs about religion in America, from the very far left through the broad middle to the very far right, both theologically and politically; from the most traditional orthodoxies to the most experimental and idiosyncratic views of the supernatural. Religious minorities are often racial or ethnic minorities as well. RLPA will protect people of all races, all ethnicities, and all socio-economic statuses.

Religious liberty is a universal human right. The Supreme Court has taken the cramped view that one has a right to believe a religion, and a right not to be discriminated against because of one's religion, but no right to practice one's religion. To the extent that it has power to do so, Congress should enact more substantive protection for religious liberty.

#### I. THE SPENDING CLAUSE PROVISIONS

Section 2(a) of RPLA tracks the substantive language of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), providing that government shall not substantially burden a person's religious exercise. It applies that language to cases within the spending power and the commerce power. Section 2(b) also tracks RFRA. It states the compelling interest exception to the general rule that government may not substantially burden religious exercise.

Section 2(a)(1) specifies the spending power applications of RLPA. The bill applies to programs or activities operated by a government and receiving federal financial assistance. "Government" is defined in §2(e)(1) to include persons acting under color of state law. In general, a private-sector grantee acts under color of law only when the government retains sufficient control that "the alleged infringement of federal rights [is] 'fairly attributable to the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

Section 2(a)(1) would therefore protect against substantial burdens on religious exercise in programs or activities receiving federal financial assistance and operating under color of state law. It would protect a wide range of students and faculty in public schools and universities, job trainees, workfare participants, welfare recipients, tenants in public housing, and participants in many other federally assisted but state-administered programs. An individual could not be excluded from a federally assisted program because of her religious dress, or because of her observance of the Sabbath or of religious holidays, or because she said prayers over meals or at certain times during the day—unless these burdens served a compelling interest by the least restrictive means.

The federal interest is simply that the intended beneficiaries of federal programs not be excluded because of their religious practice, and that federal funds not be used to impose unnecessary burdens on religious exercise. The provision is modeled directly on similar provisions in other civil rights laws, including Title VI of the Civil Rights Act of 1964, which forbids race discrimination in federally assisted programs, 42 U.S.C. §2000d (1994), and Title IX of the Education Amendments of 1972, which forbids sex discrimination in federally assisted educational programs, 20 U.S.C. §1681 (1994).

Congressional power to attach conditions to federal spending has been consistently upheld since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). Conditions on federal grants must be clearly stated, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), and they must be "[r]elated to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Thus, federal aid to one program does not empower Congress to demand compliance with RLPA in other programs. Accordingly, the bill's protections are properly confined to each federally assisted "program or activity."

*Dole* upheld a requirement that states change their drinking age as a condition of receiving federal highway funds, finding the condition directly related to safe interstate travel. *Id.* at 208. The connection between the federal assistance and the condition imposed on that assistance by RLPA is much tighter than the connection in *Dole*. Ensuring that the intended beneficiaries actually benefit is the purpose here and under other Spending Clause legislation to protect civil rights. Ensuring that the federal funds not be spent in ways that unnecessarily burden religious exercise is directly analogous to ensuring that federal funds not be spent in ways that discriminated on the basis of race. These were the purposes of Title VI, which the Court upheld in *Law v. Nichols*, 414 U.S. 563, 569 (1974). I am confident that §2(a)(1) is constitutional.

"Program or activity" is defined in §2(e)(2) by incorporating a subset of the definition of the same phrase in Title VI. The facial constitutionality of that definition has not been seriously questioned, and I do not believe that it could be. If it turns out, in the case of some particularly sprawling state agency, that federal assistance

to one part of the agency is wholly unrelated to a substantial burden on religious exercise imposed by some other and distant part of the agency, the worst case should be an as-applied challenge and a holding that the statute cannot be applied on those facts. Given the variety of ways in which agencies are structured in the fifty states, I believe that it would be difficult to draft statutory language for such unusual cases, and that they are best left to case-by-case adjudication.<sup>1</sup>

Section 2(c) provides that the bill does not authorize the withholding of federal funds as a remedy for violations. This provision is modeled on the Equal Access Act, another Spending Clause statute that precludes the withholding of federal funds. 20 U.S.C. § 4071(e) (1994). Withholding funds is too harmful, both to the states and to the intended beneficiaries of federal assistance. Because the remedy is so harmful, it is rarely used. The individual right of action provided in § 4 of RLPA is a far more appropriate remedy. States may accept or reject federal financial assistance, but if a state accepts federal assistance subject to the conditions imposed by this bill, it is obligated to fulfill the conditions and the courts may enforce that obligation. Private rights of action have been the primary and effective means of enforcement under other important Spending Clause statutes, including Title IX (see *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1978)), and of course the Equal Access Act (see *Board of Education v. Mergens*, 496 U.S. 226 (1990)).

The rule of construction in § 5(c) provides that RLPA neither creates nor precludes a right to receive funding for any religious organization or religious activity. The bill is therefore neutral on legal and political controversies over vouchers and other forms of aid to religious schools, charitable choice legislation, and other proposals for funding to religious organizations. The Coalition for the Free Exercise of Religion includes groups that disagree fundamentally on these issues, but all sides have agreed that this language is neutral and that no side's position will be undermined by this bill.

As already noted, private-sector grantees not acting under color of law are excluded from the bill. This exclusion is important, because some private-sector grantees are religious organizations, and applying the bill to them would sometimes create conflicting rights under the same statute. The result in such cases might be to restrict religious liberty rather than protect it. Extending the bill to secular grantees in the private sector would sometimes overlap with other statutory protections, as in the employment discrimination laws and public accommodations laws. The free exercise of religion has historically been protected primarily against government action, with statutory protection extended to particular contexts where Congress or state legislatures found it necessary. This bill need not change the existing scope of protection in the private sector.

## II. THE COMMERCE CLAUSE PROVISIONS

Section 2(a)(2) protects religious exercise "in or affecting commerce." This language is taken verbatim from the Federal Trade Commission Act, and it tracks similar or identical language in the Clayton Act, the Americans with Disabilities Act, and many other statutes.<sup>2</sup> This language embodies the historic constitutional stand-

<sup>1</sup>Cf. *Salinas v. United States*, 118 S.Ct. 469, 475 (1997). *Salinas* interpreted 18 U.S.C. § 666(a)(1)(B) (1994), part of the federal bribery statute, to apply to any bribe accepted in a covered federally assisted program, whether or not the federal funds were in any way affected. The Court also concluded that under that interpretation, "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case." Preferential treatment accorded to one federal prisoner (the briber) "was a threat to the integrity and proper operation of the federal program," even if it cost nothing and diverted no federal funds. The Court did not find it necessary to consider whether there might someday be an application in which the statute would be unconstitutional as applied.

<sup>2</sup>See the Clayton Act, 15 U.S.C. § 18 (1994) ("person engaged in commerce or in any activity affecting commerce"); the Federal Trade Commission Act, 15 U.S.C. § 45 (1994) ("unfair or deceptive acts or practices in or affecting commerce"); the Federal Fire Prevention and Control Act, 15 U.S.C. § 2224 (1994) ("places of public accommodation affecting commerce"); the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Semiconductor Chip Protection Act, 17 U.S.C. § 910 (1994) ("conduct in or affecting commerce"); the criminal provisions of the Health Insurance Portability and Accountability Act, 18 U.S.C. § 24 (Supp. II 1996) ("any public or private plan or contract, affecting commerce"); the Federally Protected Activities Act, 18 U.S.C. § 245 (1994) ("engaged in a business in commerce or affecting commerce"); the National Labor Relations Act, 29 U.S.C. § 152 (1994) ("affecting commerce"); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402 (1994) ("industry affecting commerce"); the Age Discrimination in Employment Act, 29 U.S.C. § 630 (1994) ("industry affecting commerce"); the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 652 (1994) ("engaged in a business affecting commerce"); the Employment and Retirement In-

ard. The bill protects all that religious exercise, and only that religious exercise, that Congress is empowered to protect. This part of the bill is constitutional by definition; any religious exercise beyond the reach of the Commerce Clause is simply outside the bill.

In written testimony submitted for this hearing, Marc Stern of the American Jewish Congress has documented some parts of the enormous volume of commerce that is based on religious exercise. This data makes clear that the activity of religious organizations substantially affects commerce; the religious exercise of these organizations is protected by the bill, subject to the compelling interest test. The religious exercise of individuals will sometimes be protected by the bill, as when religious exercise requires the use of property of a kind that is bought and sold in commerce and used in substantial quantities for religious purposes, or when an individual is denied an occupational license or a driver's license because of a religious practice.

Substantial burdens on religious exercise prevent or deter or raise the price of religious exercise. On standard economic models, such burdens reduce the quantity of religious exercise and therefore the quantity of commerce growing out of religious exercise. Religious exercise and associated commerce that is not prevented may be diverted or distorted, which are other ways of interfering with the free flow of commerce. Congress has plenary power to protect the commerce generated by religious exercise or inhibited by substantial burdens on religious exercise, and Congress's motive for acting is irrelevant. *United States v. Darby*, 312 U.S. 100 (1941).

Models for the Commerce Clause provisions include the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (Supp. II 1996), protecting papers and documents used in preparation of a publication in or affecting commerce, which has not been challenged, the commerce clause provisions of the Federally Protected Activities Act, 18 U.S.C. 245 (1994), which the Tenth Circuit has upheld, *United States v. Lane*, 883 F.2d 1484, 1489-93 (10th Cir. 1989), and the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994), forbidding racial and religious discrimination in places of public accommodation affecting commerce, which the Supreme Court has upheld.

The public accommodations law is particularly instructive. Congress's first public accommodations law was the Civil Rights Act of 1875, enacted to enforce the Thirteenth and Fourteenth Amendments. The Supreme Court struck that law down as beyond the enforcement power. *Civil Rights Cases*, 109 U.S. 3 (1883). Congress's second public accommodations law was the Civil Rights Act of 1964, enacted with substantially the same scope in practical effect but pursuant to the commerce power. The Court upheld this Act in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

The public accommodations law and the Federally Protected Activities Act are also instructive in another way. Each uses a variety of federal powers to protect as much as possible of what Congress wanted to protect. The public accommodations law applies to operations that affect commerce and also to those whose discrimination is supported by state action. 42 U.S.C. § 2000a(b) (1994). The Federally Protected Activities Act uses the enforcement power, the commerce power, the spending power, and power to prohibit interference with federal programs and activities (thus invoking all the powers which Congress used to create such programs and activities) to protect a broad list of activities. 18 U.S.C. § 245 (1994). RLPAs are more focused and less miscellaneous, but it is similar in its use of those powers that are available to protect activities in need of protection.

I have given considerable thought to *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court struck down the Gun Free Schools Act as beyond the reach of the Commerce Clause. 18 U.S.C. § 922 (1994). The offense defined in that Act was essentially a possession offense; neither purchase nor sale of the gun nor any other commercial transaction was relevant. The Court emphasized that the offense "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," 514 U.S. at 561, and that the offense "is in no sense

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come Security Act (ERISA), 29 U.S.C. § 1003 (1994) ("in commerce or in any industry or activity affecting commerce"); the Employee Polygraph Protection Act, 29 U.S.C. § 2002 (1994) ("any employer engaged in or affecting commerce"); the Family and Medical Leave Act, 29 U.S.C. § 2611 (1994) ("industry or activity affecting commerce"); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) ("if its operations affect commerce"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("engaged in an industry affecting commerce"); the Privacy Protection Act, 42 U.S.C. § 2000aa (Supp. II 1996) ("public communication, in or affecting interstate or foreign commerce"); the Energy Policy and Conservation Act, 42 U.S.C. § 6291 (1994) (trade, etc., "which affects any trade, transportation, exchange, or other commerce" between any state and any place outside of such state); the Americans with Disabilities Act, 42 U.S.C. § 1211 (1994) ("engaged in an industry affecting commerce"); the Commercial Motor Vehicle Safety Act, 42 U.S.C. § 31101 (1994) ("engaged in a business affecting commerce").

an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *Id.* at 567. *Lopez* appears to reaffirm the long-standing rule that Congress may regulate even "trivial" or "de minimis" intrastate transactions if those transactions, "taken together with many others similarly situated," substantially affect interstate commerce. *Id.* at 556, 558. I will refer to this rule as the aggregation rule: in considering whether an activity substantially affects commerce, Congress may aggregate large numbers of similar transactions.

The aggregation rule is important to the scope of the bill, and especially to the protection of small churches and individuals. A small church with a RLPA claim need not show that it affects commerce all by itself; it is enough to show that churches in the aggregate affect commerce. An individual need not show that his religious practice affects commerce all by itself; it is enough to show that the practice affects commerce in the aggregate, or perhaps that a broad set of related or analogous religious practices affects commerce in the aggregate.

The Supreme Court held just last Term, after *Lopez*, that a religious organization—a not-for-profit organization operated for the benefit of children of the Christian Science faith—affects commerce, is subject to the aggregation rule, and is protected by the dormant commerce clause. "[A]lthough the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of non-profit entities as a class are unquestionably significant." *Camps Newfound/Owatonna v. Town of Harrison*, 117 S.Ct. 1590 (1997) citing *Lopez* and *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942), for the aggregation rule. The dissents were based on the view that Maine could legitimately subsidize local charities, and on disagreements about the scope of the dormant commerce clause. No justice suggested that religious or not-for-profit corporations do not affect commerce.

The Court has also applied regulatory statutes based on the Commerce Clause to religiously affiliated not-for-profit organizations. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672, 681 n.11 (1980) (noting that "Congress appears to have agreed that non-profit institutions 'affect commerce' under modern economic conditions.").

There will likely be cases in which the effect on commerce cannot be proved, and which therefore fall outside the protections of the bill. That is the nearly unavoidable consequences of being forced to rely on the Commerce Clause. But there will be many cases in which the burdened religious exercise affects commerce when aggregated with "many others similarly situated," *Lopez*, 514 U.S. at 558, and in those situations, restricting or eliminating the religious exercise by burdensome regulation would also affect commerce. If the Supreme Court expands or contracts the scope of the Commerce Clause, it will correspondingly expand or contract the scope of the bill, but such decisions will not affect the bill's constitutionality. I am certain that the Commerce Clause provisions are constitutional, and I am confident that they will have a wide range of applications.

### III. OTHER PROVISIONS IN § 2

Section 2(d) states explicitly what would be obvious in any event—that the government that burdens religious exercise has discretion over the means of eliminating the burden. Government can modify its policy to eliminate the burden, or adhere to its policy and grant religious exemptions where necessary to avoid imposing burdens, or make any other change that eliminates the burden. The bill would not impose any affirmative policy on the states, nor would it restrict state policy in any way whatever in secular applications or in religious applications that do not substantially burden religious exercise. The bill would require only that substantial burdens on religious exercise be eliminated or justified.

The definition or "demonstrates" in § 2(e)(3) is incorporated verbatim from the Religious Freedom Restoration Act.

### IV. THE ENFORCEMENT CLAUSE PROVISIONS

Section 3 would be enacted primarily as a means of enforcing the Fourteenth Amendment. Section 3 attempts to simplify litigation of free exercise violations as defined by the Supreme Court, facilitating proof of violations in cases where proof is difficult. In some applications—church construction projects are the most obvious example—§ 3 could also be upheld as an exercise of the commerce power.

#### A. *Shifting the burden of persuasion*

Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's defini-

tion of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court.

This provision applies to any means of proving a free exercise violation recognized under judicial interpretations. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990). Thus, if the claimant shows a burden on religious exercise and prima facie evidence of an anti-religious motivation, government would bear the burden of persuasion on the question of motivation, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religious exercise and prima facie evidence that the burdensome law is not generally applicable, government would bear the burden of persuasion on the question of general applicability, on compelling interest, and on any other issue except burden on religious exercise. If the claimant shows a burden on religion and prima facie evidence of a hybrid right, government would bear the burden of persuasion on the claim of hybrid right, including all issues except burden on religion. In general, where there is a burden on religious exercise and prima facie evidence of a constitutional violation, the risk of nonpersuasion is to be allocated in favor of protecting the constitutional right.

The protective parts of the *Smith* and *Lukumi* rules create many difficult issues of proof and comparison. Motive is notoriously difficult to litigate, and the court is often left uncertain. The general applicability requirements means that when government exempts or fails to regulate secular activities, it must have a compelling reason for regulating religious activities that are substantially the same or that cause the same harm. See, e.g., *Lukumi*, 508 U.S. at 543 ("The ordinances \* \* \* fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree"); *id.* at 538-39 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice). But there can be endless arguments about whether the burdened religious activity and the less burdened secular activity are sufficiently alike, or cause sufficiently similar harms, to trigger this part of the rule. The scope of hybrid rights claims remains uncertain. Burden of persuasion matters only when the court is uncertain, but, as these examples show, the structure of the Supreme Court's rules leave many occasions for uncertainty.

The one issue on which the religious claimant always retains the burden of persuasion is burden on religion. Note that in the free exercise context, the claimant need prove only a burden, not a substantial burden. The lower courts have held that where the burdensome rule is not generally applicable, any burden requires compelling justification. *Hartmann v. Stone*, 68 F.3d 973, 978-79 & nn.3-4 (6th Cir. 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994); *Rader v. Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996).

#### *B. Land use regulation*

Section 3(b) enacts prophylactic rules for land use regulation. Section 3(b)(1)(A) provides that land use regulation may not substantially burden religious exercise, except where necessary to prevent substantial and tangible harm. Power to enact this standard without limitation to the scope of the commerce or spending power depends on a hearing record showing "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997). Note that the standard is not certainty, but "reason to believe" and "significant likelihood."

The hearing record compiled before this Committee and before the House Subcommittee on the Constitution is replete with statistical and anecdotal evidence of likely constitutional violations in land use regulation. Additional such evidence will be received today. I believe this factual record is ample to support § 3(b) as legislation to enforce the Fourteenth Amendment.

I want to add to that record a recent study by the Presbyterian Church (U.S.A.), the largest Presbyterian body in the United States. Its experience informs our understanding of the study of reported church land use cases conducted by faculty at Brigham Young University and described in Elder Oaks' testimony.

The Presbyterians surveyed their 11,328 congregations and received 9,603 responses. Twenty-three percent of those responding, or 2,194 congregations, had needed a land use permit since January 1, 1992. All further percentages set out in

this summary are percentages of these 2,194 congregations that needed a land use permit.<sup>3</sup>

This survey strikingly documents the lack of clear rules in land use cases. Thirty-two percent of the congregations reported that “no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.)” Another 15 percent reported that “even though a clear rule seemed to permit or forbid what we wanted to do, the land use authority’s principal decision involved granting exceptions to the rule based on the specifics of this particular case.” So in 47 percent of the cases, there was no generally applicable rule and the key decisions were individualized. The lack of generally applicable rules removes these cases from the general rule of *Employment Division v. Smith*; moreover, the individualized decision making provides ample opportunity for hidden discrimination of the sort documented in the Brigham Young study.

The second striking fact is the volume of church-state conflict revealed by this survey. Even so, 10 percent of their congregations reported significant conflict with government or neighbors over the land use permit, and 8 percent reported that government imposed conditions that increased the cost of the project by more than 10 percent. Some congregations may have reported both significant conflict and a cost increase of more than 10 percent; at least 15 percent, and perhaps as many as 18 percent, reported one or the other.

This means that between 325 and 400 Presbyterian congregations, or sixty to eighty per year over the last five years, experienced significant difficulty in getting a land use permit. In twenty-eight of these cases, or more than five per year, the permit was refused or the project was abandoned because the church expected the permit to be refused. Yet the Brigham Young study reveals only two reported cases ever involving Presbyterian churches. We all know that reported cases are the tip of the iceberg; this comparison gives some sense of how enormous is the iceberg and how tiny is the reported tip.

The Presbyterian and Brigham Young studies together support another inference. The Presbyterians are a well-connected, mainstream denomination by any standard. If 15 to 18 percent of Presbyterian churches are having significant land use trouble, the percentage must be much higher among Jehovah’s Witnesses, Pentecostals, Jews, and other groups more likely to be subject to prejudice. These groups are greatly overrepresented in the reported cases; it is reasonable to infer that they are also overrepresented in land use conflicts that do not go far enough to become reported cases.

One percent of responding congregations reported that “a clear rule that applied only to churches forbade what we wanted to do.” These rules would seem to be in flagrant violation of the Free Exercise Clause as interpreted in *Smith*. Ten percent reported that “a clear rule that applied only to churches permitted what we wanted to do.” This tends to confirm what no one disputes—that some communities accommodate the needs of churches. The problems described in this record are not universal. But they are very widespread.

No one claims that the church is right and government is wrong in every church land use conflict. But the statistical evidence shows the following that such conflicts are very frequent, that roughly half these conflicts are resolved in an individualized proceeding governed by no clear rules, and that small and non-mainstream churches are grossly overrepresented in the conflicts that produce reported opinions. We also know, as I testified last fall, 45 percent of Americans admit to “mostly unfavorable” or “very unfavorable” opinions of “religious fundamentalists,” and 86 percent admit to mostly or very unfavorable opinions of “members of religious cults or sects.” George Gallup, Jr., *The Gallup Poll: Public Opinion 1993* at 75–76, 78 (1994). Individualized decisions without clear rules give ample opportunity for these prejudices to operate, and helps account for the pattern of apparent bias in the reported cases. This statistical evidence is mutually corroborative with the anecdotal evidence of discriminatory land use decisions from around the country, offered by witnesses in both houses.

The individualized nature of land use regulation places it within the *Smith* exception for regulatory schemes that permit “individualized governmental assessment of the reasons for the relevant conduct.” *Church of the Lukumi Babalu Aye, Inc. v. City*

<sup>3</sup>Basic data from this study is reported in the Supplement to the Session Annual Statistical Report: End of Year 1997. Additional data from this study, provided to me by church officials, are attached as an Appendix to this Statement. Church officials could not testify in person because this hearing and last week’s hearing in the House coincided with the annual meeting of the church’s General Assembly.

of *Hialeah*, 508 U.S. 520, 537 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). Even without the benefit of the Congressional hearing record, some courts have recognized that land use cases can fall within exceptions to the general rule of *Employment Division v. Smith*. See *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344–45 n.31 (Hawaii 1998); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D. Md. 1996). The evidence that these individualized determinations frequently burden religion and frequently discriminate against religious organizations and especially discriminate against smaller and non-mainstream faiths is ample evidence of reason to believe that there are many probable violations of the Free Exercise Clause in land use regulation.

The practice of individualized determinations makes this discrimination extremely difficult to prove in any individual case, but the pattern is clear when Congress examines large numbers of cases through statistical surveys and anecdotal reports from around the country. This record of widespread discrimination and the rules that are not generally applicable shows both the need for, and the constitutional authority to enact, clear general rules that make discrimination more difficult.

Sections 3(b)(1)(B) and (C) provide that governments may not deny religious assemblies a reasonable location somewhere within each jurisdiction, and that religious assemblies may not be excluded from areas where nonreligious assemblies are permitted. The record of individualized determinations and religious discrimination also supports these provisions, but they are not so dependent on that record. It is unconstitutional to wholly exclude a First Amendment activity from a jurisdiction. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). Section 3(b)(1)(B) codifies this rule as applied to churches. Discrimination between different categories of speech, and especially discrimination between different viewpoints, already requires strong justification;<sup>4</sup> §3(b)(1)(C) codifies this rule as applied to land use regulation that permits secular assemblies while excluding churches.

Section 3(b)(2) would guarantee a full and fair adjudication of land use claims under subsection (b). Procedural rules before land use authorities may vary widely; any procedure that permits full and fair adjudication of the federal claim would be entitled to full faith and credit in federal court. But if, for example, a zoning board with limited authority refuses to consider the federal claim, does not provide discovery, or refuses to permit introduction of evidence reasonably necessary to resolution of the federal claim, its determination would not be entitled to full faith and credit in federal court. And if in such case, a state court confines the parties to the record from the zoning board, so that the federal claim still can not be effectively adjudicated, the state court decision would not be entitled to full faith and credit either. Full faith and credit includes both issue preclusion and claim preclusion. See, e.g., *Baker v. General Motors*, 118 S.Ct. 657, 663–64 & n.5 (1998).

Full and fair adjudication should include reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim. Interpretation of this provision should not be controlled by cases deciding whether habeas corpus petitioners had a “full and fair hearing” in state court. Interpretation of the habeas corpus standard is often influenced by hostility to convicted criminals seeking multiple rounds of judicial review. Whatever the merits of that hostility, a religious organization seeking to serve existing and potential adherents in a community is not similarly situated.

Subsection 3(b)(3) provides that equally or more protective state law is not preempted. Zoning law in some states has taken account of the First Amendment needs of churches and synagogues, and to the extent that such law duplicates or supplements RLPA, it is not displaced.

Subsection 3(b)(4) provides that § 2 shall not apply to land use cases. The more detailed standards of §3(b) control over the more general language of § 2. But note that this provision does not say anything about sources of constitutional power. The land use provisions may be upheld in all their applications as an exercise of power to enforce the Fourteenth Amendment; they may also be upheld in many cases as an exercise of the commerce power. There may even be cases of federally assisted land use planning processes in which these provisions would also be an exercise of the spending power. But however many sources of Congressional power support these provisions, the statutory standards to be applied in land use cases come from § 3, and not from § 2.

<sup>4</sup> See, e.g., *Capitol Square Review & Advisory v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosely*, 408 U.S. 92 (1972).

## V. JUDICIAL RELIEF

## A. General remedies provisions

Section 4 of the bill provides express remedies. Section 4(a) is based on the corresponding provision of RFRA; it authorizes private persons to assert violations of the Act either as a claim or a defense and to obtain appropriate relief. This section should be read against a large body of law on remedies and immunities under civil rights legislation. Appropriate relief includes declaratory judgments, injunctions, and damages, but government officials have qualified immunity from damage claims.

Section 4(b) provides for attorneys' fees; this is based squarely on RFRA and is essential if the Act is to be enforced.

## B. Prisoner litigation

Section 4(c) makes clear that litigation under the bill is subject to the Prison Litigation Reform Act. This provision effectively and adequately responds to concerns about frivolous prisoner litigation. In the first full year under the Prison Litigation Reform Act, federal litigation by state and federal prisoners dropped 31 percent. Administrative Office of the United States Courts, L. Meacham, *Judicial Business of the United States Courts: 1997 Report of the Director* 131-32 (Table C-2A). Further reductions may be reasonably expected, as the Act becomes better known; some provisions of the Act, such as the authorization of penalties on prisoners who file three or more frivolous actions, have not yet had much opportunity to work.

There has been substantial litigation over the constitutionality of some provisions of the Prison Litigation Reform Act, but that litigation does not affect RLPA. The courts of appeals have taken seriously the claim that provisions on existing consent decrees unconstitutionally reopen final judgments. Even so, six out of seven courts of appeals have upheld that part of the Act. Only the Ninth Circuit has struck it down, and only with respect to reopening final judgments.<sup>5</sup>

I have followed this litigation closely for my casebook, *Modern American Remedies*. I expect the Ninth Circuit to be reversed even in the highly problematic context of reopening final decrees, because the Act addresses only the prospective effect of those decrees. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (noting Congressional power to "alter[] the prospective effect of injunctions"). But however that difficult issue is resolved, it does not affect RLPA. RLPA does not require that any final judgment be reopened, and the provisions of the Prison Litigation Reform Act most important to RLPA are not the structural reform provisions that have drawn so much litigation, but the provisions that deter frivolous individual claims. I am confident that those provisions are constitutional in all but unusual applications.

If further legislative action on prisoner claims is needed, it should follow the approach of the Prison Litigation Reform Act, which addresses prisoner litigation generally. Congress should not exclude prisoners from the substantive protections of RLPA. RFRA did not cause any significant increment to prisoner litigation. The Attorney General of Texas has stated that his office handles about 26,000 active cases at any one time. Of those, 2,200 are "inmate-related, non-capital-punishment cases." Of those, sixty were RFRA claims when RFRA applied to the states. Thus, RFRA claims were only 2.7 percent of the inmate caseload, and only .23 percent (less than one-quarter of one percent) of the state's total caseload. It is also reasonable to believe that many of these sixty RFRA cases would have been filed anyway, on free exercise, free speech, Eighth Amendment, or other theories. This data is reported in Brief of Amicus Curiae State of Texas 7-8, in *City of Boerne v. Flores* (No. 95-2074), 117 S.Ct. 2157 (1997).

Senators are well aware that prisoners sometimes file frivolous claims. But they should also be aware that prison authorities sometimes make frivolous rules or commit serious abuses. Examples include *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997), in which jail authorities surreptitiously recorded the sacrament of confession between a prisoner and the Roman Catholic chaplain; *Sasnett v. Sullivan*, 91 F.3d 1081 (7th Cir. 1996), vacated on other grounds, 117 S.Ct. 2502 (1997), in which a Wisconsin prison rule prevented prisoners from wearing religious jewelry such as

<sup>5</sup>*Tyler v. Murphy*, 135 F.3d 594 (8th Cir. 1998); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), cert. petition filed (Apr. 13, 1998, No. 97-1693); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), cert. petition filed (Mar. 2, 1998, No. 97-8120); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657-58 (1st Cir. 1997), cert. petition filed, 66 U.S.L.W. 3531 (Feb. 4, 1998, No. 97-1278); *Benjamin v. Johnson*, 124 F.3d 162 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. petition filed (Jan. 5, 1998, No. 97-7420); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 117 S.Ct. 2460 (1997); but cf. *Taylor v. United States*, 1998 Westlaw 214578 (9th Cir., May 4, 1998).

crosses, on grounds that Judge Posner found barely rational; and *McClellan v. Keen* (settled in the District of Colorado in 1994), in which authorities let a prisoner attend Episcopal worship services but forbade him to take communion.

RLPA is needed to deal with such abuses to the extent that Congress can reach them. Whether RLPA applies will depend on whether the particular prison system receives federal financial assistance, on whether the prisoner can show a substantial effect on commerce, or on whether the prisoner can show a prima facie violation of the Free Exercise Clause. Probably some prisoner claims will be covered and others will not. But it is important not to exclude those that can be covered.

### C. Sovereign immunity

Section 4(d) waives the sovereign immunity of the United States, and overrides the Eleventh Amendment immunity of the states, "in claims for a violation of the Free Exercise Clause under section 3." This waiver and override does not apply to claims under section 2.

Congress has power to waive the sovereign immunity of the United States whenever it chooses, so there is no doubt about the constitutionality of §4(d)(2). It is a discretionary choice, and not a constitutional requirement, that the bill confines the waiver of sovereign immunity to claims under §3.

Section 4(d)(1) fully conforms with constitutional limitations on Congressional power to override the Eleventh Amendment immunity of the states. The relevant law is clearly set out in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* holds that Congress can *not* override Eleventh Amendment immunity in legislation under the Commerce Clause. It concludes that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73.<sup>6</sup>

But the Court's opinion twice distinguishes and apparently reaffirms *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *Seminole Tribe*, 517 U.S. at 59, 65–66. *Fitzpatrick* holds that Congress can override Eleventh Amendment immunity in legislation to enforce the Fourteenth Amendment. Then-Justice Rehnquist's opinion for the Court concluded:

But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. \* \* \* We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456. *Fitzpatrick* was a Title VII suit for retroactive pension benefits to be paid by the state of Connecticut, so the holding unambiguously includes suits of statutory claims if the statute was enacted to enforce the Fourteenth Amendment. Accordingly, the override of Eleventh Amendment immunity can include claims directly under the Free Exercise Clause and also claims under §3 of RLPA, which would be enacted to enforce the Free Exercise Clause.

## VI. RULES OF CONSTRUCTION

The rules of construction in §5 clarify the bill and greatly reduce the risk of misinterpretation.

Section 5(a) is based on RFRA. It provides that the Act does not authorize government to burden any religious belief, avoiding any risk that the compelling interest test might be transferred from religious conduct to religious belief. Section 5(b) provides that nothing in the bill creates any basis for regulating or suing any religious organization not acting under color of law. These two subsections serve the bill's central purpose of protecting religious liberty, and avoid any unintended consequence of reducing religious liberty.

Sections 5(c) and 5(d) keep this bill neutral on all disputed questions about government financial assistance to religious organizations and religious activities. Section 5(c) states neutrality on whether such assistance can or must be provided at all. Section 5(d) states neutrality on the scope of existing authority to regulate pri-

<sup>6</sup>This conclusion probably does not include the Spending Clause. The Court noted "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 65. Congress may be able to require that states waive their Eleventh Amendment immunity with respect to programs for which they voluntarily accept federal financial assistance. Immunity would then be removed not by legislation under Article I, but by the consent of the state. But RLPA does not embody this theory; the override of immunity does not include claims under the Spending Clause provisions.

vate entities as a condition of receiving such aid. Section 5(d)(1) provides that nothing in the bill authorizes additional regulation of such entities; § 5(d)(2), perhaps in an excess of caution, provides that existing regulatory authority is not restricted except as provided in the bill. Agencies with authority to regulate the receipt of federal funds retain such authority, but their specific regulations may not substantially burden religious exercise without compelling justification.

Section 5(e) provides that proof that a religious exercise affects commerce for purposes of this bill does not give rise to an inference or presumption that the religious exercise is subject to any other statute regulating commerce. Different statutes exercise the commerce power to different degrees, and the courts presume that federal statutes do not regulate religious organizations unless Congress manifested the intent to do so. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1990).

Section 5(f) states that each provision and application of the bill shall be severable from every other provision and application.

Section 6 is also a rule of construction, taken directly from RFRA, insuring that this bill does not change results in litigation under the Establishment Clause.

#### VII. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT

Section 7 of the bill amends RFRA to delete any application to the states and to leave RFRA applicable only to the federal government. Section 7(a)(3) amends the definition of "religious exercise" in RFRA to conform it to the RLPA definition, discussed below.

#### VIII. DEFINITIONS

Section 8 contains definitions. Section 8(1) defines "religious exercise" to mean "an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief." Section 7(a)(3) inserts the same definition into RFRA.

This definition codifies the intended meaning of RFRA as reflected in its legislative history. The decisions that most thoroughly examined the legislative history and precedent concluded that Congress intended to protect conduct that was religiously motivated, whether or not it was compelled.<sup>7</sup>

The Supreme Court's cases have not distinguished religiously compelled conduct from religiously motivated conduct. The Congressional Reference Service marshalled these opinions for the RFRA hearings, noting that the Court has often referred to protection for religiously motivated conduct. Letter from the American Law Division of the Congressional Research Service to Hon. Stephen J. Solarz (June 11, 1992), in *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 131, 131-33 (1992). Since that compilation, justices on both sides of the issue have treated the debate as one over protection for religious motivation, not compulsion.<sup>8</sup>

Congress nowhere expressed any intention to confine the protection of RFRA to practices that were "central" to a religion. This concept did not appear either in statutory text or legislative history; it was read into the statute by some courts after RFRA's enactment. Other courts rejected or ignored this misinterpretation; the most extensive opinion concluded that Congress did not intend such a requirement, that pre-RFRA cases did not contain it, and that courts could not resolve disputes about the centrality of religious practices. *Muslin v. Frame*, 891 F. Supp. 226, 230-31 (E.D. Pa. 1995), *aff'd mem.*, possibly on other grounds, 107 F.3d 7 (1997).

Insistence on a centrality requirement would insert a time bomb that might destroy the statute, for the Supreme Court has repeatedly stated that courts cannot

<sup>7</sup> *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-47 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018, 1022 (7th Cir. 1996), vacated on other grounds, 117 S.Ct. 2502 (1997); *Muslim v. Frame*, 891 F. Supp. 226, 229-31 (E.D. Pa. 1995), rehearing denied, 897 F. Supp. 216, 217-20 (E.D. Pa. 1995), *aff'd mem.*, possibly on other grounds, 107 F.3d 7 (3d Cir. 1997); *Mack v. O'Leary*, 80 F.3d 1175, 1178-80 (7th Cir. 1996), vacated on other grounds, 118 S.Ct. 36 (1997).

<sup>8</sup> *City of Boerne v. Flores*, 117 S.Ct. 2157, 2173 (Scalia, J., concurring) ("religiously motivated conduct"); *id.* at 2174 (same); *id.* at 2177 (O'Connor, J., concurring) (same); *id.* at 2178 (same); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 ("conduct motivated by religious beliefs"); *id.* at 533 ("religious motivation"); *id.* at 538 (same); *id.* at 543 ("conduct with religious motivation"); *id.* at 545 ("conduct motivated by religious belief"); *id.* at 546 ("conduct with a religious motivation"); *id.* at 547 ("conduct motivated by religious conviction"); *id.* at 560 n.1 (Souter, J., concurring) ("conduct motivated by religious belief"); *id.* at 563 ("religiously motivated conduct"); *id.* ("conduct \* \* \* undertaken for religious reasons") (quoting *Employment Div. v. Smith*, 494 U.S. at 532); *id.* at 578 (Blackmun, J., concurring) ("religiously motivated practice").

hold some religious practices to be central and protected, while holding other religious practices noncentral and not protected. *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1985). The Court in *Smith* unanimously rejected a centrality requirement 494 U.S. at 886–87 (opinion of the Court); *id.* at 906–07 (O'Connor, J., concurring); *id.* at 919 (Blackmun, J., dissenting). The Court's disagreement over whether regulatory exemptions are constitutionally required does not depend on any disagreement about a centrality requirement.

In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that “the less central and observance is to the religion in question the less the officials must do” to avoid burdening it. *Mack v. O'Leary*, 80 F.3d 1175, 1180 (1996), vacated on other grounds, 118 S.Ct. 36 (1997). The concurring and dissenting opinions in *Smith* imply a similar view, in the passages cited in the previous paragraph. But this balancing at the margins in individual cases is a very different thing from a threshold requirement of centrality, in which all religious practices are divided into two categories and cases are dismissed as a matter of law if the judge finds, rightly or wrongly, that a practice falls in the noncentral category. Such an either-or threshold requirement greatly multiplies the consequences of the inevitable judicial errors in assessing the importance of religious practices. RLPA properly disavows any such interpretation.

Section 8(2) cautiously defines the Free Exercise Clause to include both the clause in the First Amendment and the application of that clause to the states through the Fourteenth Amendment.

Section 8(3) defines government to include both the state and federal governments. But note that for purposes of §2, government includes only state governments. The reason is straightforward. Section 2 adds nothing that will not be in RFRA as amended, and RFRA still applies to the federal government. In *re Young*, 1998 Westlaw 166642 (8th Cir., Apr. 13, 1998), cert. petition filed (Apr. 27, 1998); *EEOC v. Catholic University*, 83 F.3d 455, 470–71 (D.C. Cir. 1996). But §3 includes provisions not contained in RFRA, §4 provides remedies that apply to §3, and the rules of construction apply to §3. So all of the bill except §2 properly applies to both the state and federal governments.

## IX. OTHER CONSTITUTIONAL OBJECTIONS

### A. *The establishment clause*

Justice Stevens suggested that RFRA might violate the Establishment Clause. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2172 (1997). He got no vote but his own, and his view has no support in the Court's precedents. Government is not obligated to substantially burden the exercise of religion, and government does not establish a religion by leaving it alone. RLPA would not violate the Establishment Clause.

The Supreme Court unanimously upheld regulatory exemptions for religious exercise in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). There the Court held that Congress may exempt religious institutions from burdensome regulation. The Court so held even with respect to activities that the Court viewed as secular, *id.* at 330, even though the Court expressly assumed that the exemption was not required by the Free Exercise Clause, *id.* at 336, and even though the exemption applied only to religious institutions and not to secular ones, *id.* at 338–39. *Amos* held that alleviation of government-imposed burdens on religion has a secular purpose, *id.* at 335–36, and that the religious organization's resulting ability better to advance religious ends is a permitted secular effect, *id.* at 336–37. Exempting religious practice also avoids entanglement between church and state “and effectuates a more complete separation of the two.” *Id.* at 339. *Amos* expressly rejected the assumption that exemptions lifting regulatory burdens from the exercise of religion must “come packaged with benefits to secular entities.” *Id.* at 338.

The Supreme Court has at times questioned or invalidated exemptions that focus too narrowly on one religious faith or one religious practice, that do not in fact relieve any burden on religious exercise, or that shift the costs of a religious practice to another individual who does not share the faith. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), in a badly splintered set of opinions with no majority, the Court struck down a sales tax exemption for religious publications. The simplest explanation for this decision is that the exemption involved viewpoint discrimination among the publications; the plurality also reasoned that the sales tax was not a substantial burden, and thus there was not burden to be lifted. In *Board of Education v. Grumet*, 512 U.S. 687 (1994), the Court struck down an “accommodation” that benefited only one community of one sect, and did so not by simply exempting it from regulation, but by granting it political authority. Even so, four justices would

have upheld it. The majority invalidated the law at issue because of its “anomalously case-specific nature.” *Id.* at 703. But it also reaffirmed the principles of *Amos*:

[T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.

*Id.* at 705 (1994). This opinion was written after *Smith* and after *Texas Monthly*.

Similarly in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), the Court invalidated a law providing absolute protection for Sabbath observers in the workplace. Distinguishing Title VII’s general requirement that employers accommodate religious practices where that can be done without undue hardship, 42 U.S.C. § 2000e(j) (1994), Justice O’Connor emphasized that Title VII is not absolute and that it protects “all religious beliefs and practices rather than protecting only the Sabbath observance.” *Id.* at 712 (concurring).

RLPA not only avoids these constitutional dangers; it combats them. The bill minimizes the risk of denominational preference by enacting a general standard exempting all religious practices from all substantial and unjustified regulatory burdens; its even-handed generality serves the important Establishment Clause value of neutrality among the vast range of religious practices. By its own terms, the bill does not apply unless there is a substantial burden on the exercise of religion. And if particular proposed applications unfairly shift the costs of a religious practice to another individual, those applications will be avoided by interpreting the compelling interest test or by applying the Establishment Clause to the statute as applied.

Religion and the exercise of religion should be understood generously for purposes of RLPA, and unconventional beliefs about the great religious questions should be protected.<sup>9</sup> But the Constitution distinguishes religion from other human activities, and it does so for sound reasons. In history that was recent to the American Founders, government regulation of religion had caused problems very different from the regulation of other activities. The worst of those problems are unlikely in America today, and our tradition of religious liberty is surely a large part of the reason.

But that tradition is threatened in new ways. It is threatened by a substantial body of public opinion that is openly hostile to persons who take their religion more seriously than the norm. As I testified last fall, 45 percent of Americans admit to “mostly unfavorable” or “very unfavorable” opinions of “religious fundamentalists,” and 86 percent admit to mostly or very unfavorable opinions of “members of religious cults or sects.” George Gallup, Jr., *The Gallup Poll: Public Opinion 1993 at 75–76, 78* (1994). Religious liberty is also threatened by the vast expansion of government regulation. These two forces intersect in regulatory schemes that leave discretion to public officials, many of whom will necessarily be drawn from the 45 percent of the public who holds such unfavorable opinions with strong religious faith.

Pervasive regulation regularly interferes with the exercise of religion, sometimes in discriminatory ways, sometimes by the mere existence of so much regulation written from a majoritarian perspective. Many Americans are caught in conflicts between their constitutionally protected religious beliefs and the demands of their government. RLPA would not establish any religion, or religion in general; it would protect the civil liberties of people caught in these conflicts.

### B. Federalism

RLPA is consistent with general principles of federalism that sometimes limit the powers granted to Congress.

In particular, RLPA would not violate *Printz v. United States* 117 S.Ct. 2365 (1997). *Printz* struck down federal imposition of specific affirmative duties on state officers to implement federal programs. It held that Congress “cannot compel the

<sup>9</sup>Justice Stevens argued that “an art museum owned by an atheist would not be protected” by RFRA. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2172 (1997) (concurring). But of course an art museum owned by a Catholic would not be protected either. The proper analogy to a church would be a building set aside for meetings to promote or celebrate atheism. That building might well be protected, by RFRA or RLPA or by The Free Speech Clause or even Free Exercise Clause. See *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127 (D.C. Cir. 1957) (Warren Burger, J.); *Fellowship of Humanity v. County of Alameda*, 315 P. 2d 394 (Cal. App. 1957). Views about religion are different from views about other matters in our constitutional tradition. The First Amendment privatizes disagreements rooted in religion, putting them beyond the reach of government policy; disagreements rooted in politics or other secular matters are necessarily left to resolution by the political process. Political, artistic, professional, and similar commitments are different from religious commitments because government is empowered to decide about those matters; it is not empowered to decide about religious matters.

States to enact or enforce a federal regulatory program," and that it "cannot circumvent that prohibition by conscripting the State's officers directly," *Id.* at 2384.

The proposed bill does not impose any specific affirmative duty, implement a federal regulatory program, or conscript state officers. The substantive provisions of the bill are entirely negative; they define one thing that states cannot do, leaving all other options open. The bill thus pre-empts state laws inconsistent with the overriding federal policy of protecting religious liberty in areas constitutionally subject to federal authority.

The bill operates in the same way as other civil rights laws, which pre-empt state laws that discriminate on the basis of race, sex, and other protected characteristics, and in the same way as other legislation protecting the free flow of commerce from state interference. Congress could itself regulate all transactions affecting interstate commerce, and then exempt burdened religious exercise from its own regulation. Or it could enact a code for religious conduct affecting commerce, specifically protecting most religious practices affecting commerce and prohibiting those that prevented achievement of interests Congress found compelling. Congress has instead taken the much smaller step of pre-empting state regulation that unnecessarily burdens religious exercise, leaving the states in the first instance to decide what interests to pursue, what religious practices to regulate, and what regulations to defend against challenges in Court. *Cf. New York v. United States*, 505 U.S. 144, 167 (1992):

Where Congress has power to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

RLPA would pre-empt to the minimum extent compatible with the federal policy; it pre-empts the unjustified burden on religious exercise but leaves all other options open. As already noted, §2(d) makes explicit what would be clear in any event—states can pursue any policy they choose, and remove burdens in any way they choose, so long as long as they do not substantially burden religious exercise without compelling reason.

*Printz* distinguishes and leaves unchanged two important pre-emption cases upholding federal statutes in the era of *National League of Cities v. Usery*, 426 U.S. 833 (1976). In each case, the *Printz* majority noted that the federal law "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." 117 S.Ct. at 2380.

The first of these cases was *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), which upheld a federal statute that required states either to affirmatively implement a specific federal regulatory program or turn the field over to direct federal regulation. The Court said that "nothing" in *National League of Cities* "shields the States from pre-emptive federal regulation of private activities affecting interstate commerce." *Id.* at 291. *Hodel* is reaffirmed not any in *Printz*, but also in *New York v. United States*, 505 U.S. 144, 161 (1992).

The Court reached similar conclusions in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 US 742 (1982) (the *FERC* case). The statute there went further than either *Hodel* or RLPA; it required the state to "consider" implementing an affirmative federal policy. But the state was not required to adopt the policy, and law's provisions "simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals." *Id.* at 765.

In *Hodel*, the Court commented that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining." *Id.* at 290. RLPA would not go nearly so far. It would prohibit only some state regulation of religious exercise—regulation that falls within the reach of spending or commerce powers, that substantially burdens religious exercise, and that cannot be justified by a compelling interest.

*Hodel* and *FERC* also went much further than RLPA in another way, because they required states either to implement or consider specific and affirmative federal policies or cede the field to federal regulation. RLPA imposes no specific policies, but only the general limitation that whatever policies they pursue, states cannot substantially burden religious exercise without compelling reason.

Some provisions of the statutes in *Hodel* and *FERC* were directed expressly to the states and, in a sense, applied only to the states. Only the state agency could implement or consider the federal policy. But this did not render the statutes invalid for singling out the states. Congress was pursuing a policy for the appropriate regulation of private conduct, and it required the states to conform to that policy or to vacate the field. This is the classic work of federal pre-emption.

If RLPA seems in any way odd, it is because the federal policy with respect to the private sector is generally one of deregulation, not regulation. The Congressional

policy is that religious exercise not be substantially burdened without compelling reason. Congress has no more affirmative or more specific regulatory policy for religion to substitute for the pre-empted regulation. But that is not unique either. As Professor Thomas Berg points out in a forthcoming article, the statutes deregulating the transportation industries broadly pre-empted state regulation and substituted only minimal federal regulation in its place. He cites the Staggers Rail Act of 1980, 40 U.S.C. § 10505 (1994), and the Airline Deregulation Act of 1978, 49 U.S.C. § 41701 et seq. (1994).

It is instructive to compare the pre-emption provision of the Airline Deregulation Act with the central provision of RLPA:

**Airline Deregulation Act, 49 U.S.C.  
§ 41713(b) (1994)**

Except as provided in this subsection,  
a State, political subdivision of a  
state, or political authority of at  
least 2 States  
may not enact or enforce a law, reg-  
ulation, or other provision having  
the force and effect of law related  
to a price, route, or service of an  
air carrier  
that may provide air transportation  
under this subpart.

**Religious Liberty Protection Act, § 2**

Except as provided in subsection (b),  
a government [defined elsewhere in  
mean states and their subdivisions]  
shall not substantially burden a per-  
son's religious exercise  
  
(1) in a program or activity, oper-  
ated by a government, that receives  
Federal financial assistance; or  
(2) in or affecting commerce with  
foreign nations, among the several  
States, or with the Indian tribes.

There is no difference in structure or in principle between these two provisions. Both on their face regulate state laws and only state laws. Both in their operation merely pre-empt state laws that are inconsistent with a federal policy of deregulation. This parallelism should not be surprising, for RLPA is in fact a religion deregulation act. The Airline Deregulation Act provision was broadly construed, without constitutional challenge, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Nothing in either *Printz* or the *National League of Cities* line of cases casts doubt on federal power to pre-empt state regulation inconsistent with federal policy in areas where Congress could regulate directly if it chose. That is all the Religious Liberty Protection Act would do.

X. CONCLUSION

This bill is needed for the reasons set forth by other witnesses and in earlier hearings. The bill's opponents seem to be few in number, but they are able and creative; they can think of many arguments. In this testimony, I have tried to anticipate those arguments.

No one can predict how the Supreme Court might change the law in the future. But Congress should not be intimidated into not exercising powers that have been established for decades because of the risk that the law might change in the future. The bill is clearly within Congressional power under existing law, and I urge its enactment.

## Appendix to Statement of Douglas Laycock

## Data from Study by Presbyterian Church (U.S.A.)

SUPPLEMENT TO THE SESSION ANNUAL STATISTICAL REPORT:  
END OF YEAR 1997

CLERKS OF SESSION MAY FIND IT NECESSARY TO CONSULT WITH PASTORS ON SOME QUESTIONS

Number of Congregations .....	9,603
Number of Returned Forms .....	11,328
Response Rate .....	85%

## Land Use

6. Since January 1, 1992, has your congregation needed any form or permit from a government authority that regulates the use of land? These authorities include zoning boards, planning commissions, landmark commissions, and (sometimes) city/county councils? Circle the number for *all* that apply. (If more than one such experience, answer in terms of the most recent.)

no, we have not needed any such permits (Skip to Q-10) .....	77%
yes, we needed permission to build or occupy one or more buildings at a <i>new</i> site .....	3%
yes, we needed permission for expansion, construction, or demolition at our existing site .....	18%
yes, we needed permission for a new program or for some other change in use in a building at our existing site .....	5%

7. What was the outcome of the permit process?

	n=2,194
the permit was granted .....	94%
the permit was refused or we abandoned the project because we expected the permit to be refused .....	1%
the permit process has not yet been resolved .....	4%

8. Which of the following describe the permit process? (Circle *all* that apply.)

	n=2,194
there was no significant conflict .....	85%
there was significant conflict with city/county staff, neighbors, commission members, or others .....	10%
approval was subject to conditions that increased the cost of the project by more than 10% .....	8%

9. Which of the following describe the permit process itself? (Circle *all* that apply.)

	n=2,194
a clear rule that applied to secular buildings of similar size either permitted or forbade what we wanted to do .....	51%
a clear rule that applied only to churches permitted what we wanted to do .....	9%
a clear rule that applied only to churches forbade what we wanted to do .....	1%
even though a clear rule seemed to permit or forbid what we wanted to do, the land use authority's principal decision involved granting exceptions to the rule based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.) .....	15%
no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.) .....	32%

n = number of respondents eligible to answer this question

◆ = percentages add to more than 100 because respondents could make more than one response

**Multiple Response**

Group REGLAND CONGREG NEEDED A LAND PERMIT?  
(Value tabulated = 1)

Dichotomy label	Name	Count	Pct of Responses	Pct of Cases
USE OF LAND:NOT NEEDED ANY PERMITS	Q6A	7160	75.0	76.6
USE OF LAND:FOR NEW SITE	Q6B	320	3.4	3.4
USE OF LAND:FOR EXISTING SITE	Q6C	1632	17.1	17.5
USE OF LAND:NEW PROGRAM	Q6D	435	4.6	4.7
Total responses		9547	100.0	102.1

254 missing cases; 9,349 valid cases

**Frequencies**

Q7 WHAT WAS THE OUTCOME OF THE PERMIT PROCESS?

Valid	Frequency	Percent	Valid Percent	Cumulative Percent
1 PERMIT WAS GRANTED	2043	93.1	94.2	94.2
2 PERMIT WAS REFUSED	28	1.3	1.3	95.5
3 PERMIT PROCESS NOT YET BEEN RESOLVED	98	4.5	4.5	100.0
Total	2169	98.9	100.0	
Missing -1	25	1.1		
Total	25	1.1		
Total	2194	100.0		

*9603*  
*9547*  
*11328 = 24.7*  
*3 cases not in*

**Multiple Response**

Group CONFLICT CONFLICT INVOLVED IN PERMIT PROCESS?  
(Value tabulated = 1)

Dichotomy label	Name	Count	Pct of Responses	Pct of Cases
PERMIT PROCESS:NO SIGNIFICANT CONFLICT	Q8A	1840	82.5	85.2
PERMIT PROCESS:SIGNIFICANT CONFLICT	Q8B	208	9.3	9.6
PERMIT PROCESS:APPROVAL SUBJECT TO CONDI	Q8C	183	8.2	8.5
	Total responses	2231	100.0	103.3

34 missing cases; 2,160 valid cases

### Multiple Response

Group PROCESS DESCRIBE THE PERMIT PROCESS  
(Value tabulated = 1)

Dichotomy label	Name	Count	Pct of Responses	Pct of Cases
PROCESS: CLEAR RULE APPLIED SECULAR BUILD	Q9A	1055	47.3	51.3
PROCESS: CLEAR RULE APPLIED ONLY TO CHURC	Q9B	191	8.6	9.3
PROCESS: CLEAR RULE FORBADE WHAT WE WANTE	Q9C	10	.4	.5
PROCESS: GRANTING EXCEPTIONS TO THE RULE	Q9D	315	14.1	15.3
PROCESS: NO CLEAR RULES	Q9E	658	29.5	32.0
	Total responses	2229	100.0	108.3

136 missing cases; 2,058 valid cases

The CHAIRMAN. Professor Hamilton.

**STATEMENT OF MARCI A. HAMILTON**

Ms. HAMILTON. Thank you, Mr. Chairman and members of the committee, for inviting me today. It is an honor to be talking about this vital constitutional issue. As my written statement makes clear, it is my view that the Religious Liberty Protection Act is clearly unconstitutional. In fact, I don't view it as a very difficult problem.

As the first panel made absolutely and abundantly clear, this is an attempt to overturn the Supreme Court's decision in *Smith*. It is the unhappiness with the Supreme Court's decision in *Smith* that motivates RLPA and that informs it, and it is obvious that this is a repetition of RFRA; it is, in fact, RFRA II, as it is referred to on the religious law ListServ. It is RFRA II because it is the same standard. It is the compelling interest test and least restrictive means test attempting to be packaged in a Commerce Clause or a spending power rationale.

So all one needs to do to understand what is wrong with RLPA is to read the *Boerne* decision and *Marbury v. Madison*. It is plainly a violation of the separation of powers. This body does not have the power to attempt to overturn the meaning of the First Amendment as established by the Supreme Court.

Second, as *Boerne* also made clear, this body does not have the power to amend the Constitution without undergoing ratification procedures. This is an attempt to end-run Article V of the Constitution which requires super-majorities and massive involvement of the States in order to amend the Constitution. This is an attempt to amend the Free Exercise Clause, as we understood from the first panel when we heard repeated statements that the *Boerne* decision was wrong, that RFRA was right.

Now, third, this law is a plain assault on States' rights. It is an attempt by the Federal Government to micromanage local land use. It is inconceivable how far this bill would go. Apparently, when any zoning law is generally applicable or neutral, it will now be subjected to the least restrictive means test which, as the Supreme Court said in *Boerne* at 117 Supreme Court at 2171, was not a test they have employed in prior cases.

Local zoning authorities are now going to have to prove this is the least restrictive means for this religious believer, plus they are going to have to show that there is tangible harm to neighbors, neighboring properties, and interests, whatever that means. And, in addition, one has to wonder under section 3 of the bill how many variances will churches be permitted. Is it the fifth variance that will be too much, or the sixth variance, or the seventh variance? Churches have a tendency to establish themselves and to exist for long periods of time. This bill would permit them to continually agitate against local land use laws that are truly neutral and generally applicable and enacted for the interests of the neighbors.

Now, the question that has to be asked constitutionally about this aspect of the bill under the *Boerne* decision is whether or not this is proportional to the harm that has been proved in front of Congress. The harm so far that has been proved are claims that it is difficult to prove discrimination. Because it is difficult to prove

discrimination, it will be necessary to use the Federal Government to regulate every local land use decision that affects a church. That does not sound proportional to me at all. It sounds disproportional and it sounds like a hammer going after a gnat, and that is precisely what the Supreme Court in the *Boerne* decision said this body is not permitted to do.

Now, the next problem with the bill that has to be addressed is what is its enumerated power because Congress cannot act without an enumerated power. Now, I understand Professor Laycock's argument that this is perfectly acceptable under the Commerce Clause and it is perfectly acceptable under the Spending Clause, but I don't understand where this has ever been attempted before.

Title VI does not begin to reverse the Supreme Court's interpretation of any aspect of the Constitution. It doesn't go farther. Title VI—and I have now read every page of its legislative history—was enacted for the purpose of getting rid of discrimination on the basis of race, which I understand is unconstitutional. So I don't see any precedent for this. This is a much broader attempt. It is, in fact, an attempt to expand Congress' powers beyond anything that it has done before.

Finally, the bill obviously violates the Establishment Clause. The Supreme Court in *Smith* did say that accommodation in particular circumstances can be constitutional. But if you look back at the Court's Establishment Clause jurisprudence, what they had to have meant was not that this body has the ability to pass broad-brush, across-the-board attempted exemptions, but rather that this body can consider in specific circumstances—for example, the bill that Senator Grassley brought up—in specific circumstances, is it necessary to provide an exemption?

That is not what this bill is. This was not invited by the Court in *Smith*. This is, in fact, an attempt to solve all of the social problems being brought before this panel in one fell swoop. That certainly, in my view, does not accord with the Establishment Clause.

RLPA is, in fact, a re-creation of RFRA, and the single most troubling aspect of RFRA is repeated in RLPA, and that problem is its huge scope. This is a massive power shift to religion. Religion, before 1990, in the vast majority of cases, and none before the Supreme Court, did not get an opportunity to claim that government must prove the least restrictive means for this religious believer. This is new power to religion.

The other problem with the bill is that it creates a large incapacity for this body to be able to investigate it. It covers every possible spending by the Federal Government. As I read the bill, I am not sure about the answer to Senator Grassley's question about whether or not tax-exempt status or any of those sorts of tax issues will be covered by the bill. It is a huge bill and, at the very least, the people of the United States deserve to have Congress investigate through the General Accounting Office where Federal money lands. Where are all these programs that are now going to have a different standard than they would have had ever before?

Let me just quickly, because I am certain I am using up all the time that I have been afforded, tell you about pragmatic, real-life examples and where we might want to be concerned about giving religion a leg up. I would like to be realistic about religion. I am,

in fact, a Presbyterian and I am a very religious person, but there are many religions that practice activities that are not necessarily in the public's interest.

The question posed by RLPA is the following. What happens when a religion claims that children should not be immunized? What about the laws that require vaccinations? What is the least restrictive means in that circumstance, is my question. Is the least restrictive means going to include forcing them to have the vaccination, or rather is it going to say, no, they don't have to have the vaccination, but we will just quarantine them when they get the disease that is now deadly to other people?

Where is the least restrictive means when you have a religion that practices child or spousal abuse? Is the least restrictive means going to be accomplished by keeping the children and the women away from the battering spouse, or is the least restrictive means going to be accomplished by posting authorities outside the residence where the abuse is occurring?

Where is the least restrictive means when Sikh school children will ask to carry small knives to school in schools that have generally applicable laws that refuse to permit children to carry weapons? We already know the answer to that in California. In California, the least restrictive means test means that children can carry knives to school, strapped to their legs, basted in with thread.

Now, in California there is a very active activity with respect to a State mini-RFRA, as we call it. The State juvenile court has yesterday filed a letter explaining what harm will happen to children if the least restrictive means test is the one that is used.

First, under a least restrictive means test, the juvenile court of California is very concerned that parents will have more power; they will have more means and more time to abuse children. There will be a slowdown in adoption proceedings, which means more children will remain in foster care, and there will be a vast escalation in litigation costs because of the slowdowns. The furthest departure, of course, for RLPA is its departure from the Supreme Court's decision in *Turner*, where the Supreme Court said that the prisons are not going to be subject to strict scrutiny, but to a very much lower standard.

In sum, the only reason that I can understand that RLPA looks attractive is because it is stated in legalistic and abstract language. This body has a constitutional obligation to investigate its impact independent of the factions that are pushing for it and for the sake of the civil liberties of all those who will be affected by such a law.

Thank you very much.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Hamilton follows:]

#### PREPARED STATEMENT OF MARCI A. HAMILTON

Thank you, Mr. Chairman and members of the Committee, for inviting me to speak today on this important constitutional law topic. I am a Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law. I was also the lead counsel for the City of Boerne, Texas in the case that ultimately invalidated the Religious Freedom Restoration Act (RFRA). See *Boerne v. Flores*, 117 S.Ct. 2157 (1997). I have devoted the last five years of my life to writing about, lecturing on, and litigating the Religious Freedom Restoration Act and similar religious liberty legislation in the states. For the record, I am a religious believer.

As you know, the *Boerne v. Flores* decision unequivocally rejected RFRA. Not a single member of the Supreme Court defended the law in either the majority, the concurrences, or the dissents. The Court's decision was not a result of any hostility on the part of the Court toward this body. That is evident in its calm, evenhanded tone. Nor was it the result of mistaken understandings of its own precedents. The decision was inevitable. Contrary to Professor Laycock's and the Congressional Research Service's confident assurances in the RFRA legislative record, RFRA was plainly ultra vires.

I will not belabor RFRA's faults here, but rather refer you to the bibliography that follows this testimony.

Today I am here to tell you that I believe that RLPA violates the Constitution.

That this bill, which is a slap in the face of the Framers and the Constitution, is receiving a hearing indicates that what I say today may not make much difference. If Congress wants to be perceived as the savior of religious liberty and wants to defer to the most powerful coalition of religions in this country's history, there is absolutely nothing that I can do about it. Thus, I will not offer detailed critique of each of this bill's glaring constitutional errors. Instead, I will offer a summary of those errors.

Then I will share with you the interests that will be hurt by granting religion this unprecedented quantum of power against the government.<sup>1</sup> I represent none of these interests, but I have heard their stories in my travels around the country these five years.

#### RLPA'S MOST SEVERE CONSTITUTIONAL DEFECTS

##### *RLPA Violates the Separation of Powers*

Like RFRA, RLPA is an undisguised attempt to reverse the Supreme Court's interpretation of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), and to take over the Court's core function of interpreting the Constitution. See Secs. 2(a) and 3(a). For a clear discussion explaining why this is beyond Congress's power, see *Boerne v. Flores*, 117 S.Ct. at 2172.

##### *RLPA Violates the Constitution's Ratification Procedures*

Like RFRA, RLPA attempts to amend the Constitution by a majority vote, bypassing Article V's required ratification procedures in direct violation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a plain discussion in which the Court reasserts its allegiance to *Marbury*, see *Boerne v. Flores*, 117 S.Ct. at 2168.

##### *RLPA Is an Assault on States' Rights*

Despite its rote recitation of language from cases addressing federalism issues, see, e.g., Sec. 2(d) ("state policy not commandeered"), this bill federalizes local land use law and (if good law) would eviscerate one of the final strongholds of local government. It violates the letter and the spirit of the modern Court's emerging structural constitutional jurisprudence. See *Printz v. United States* 117 S.Ct. 2365 (1997), *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. U.S.*, 505 U.S. 144 (1992). If good law, RLPA's micromanagement of local land use law would set the pace for an expansive invasion of state and local government authority.

If RLPA becomes law, it will haunt any representative who attempts to climb onto the limited federal government platform.

##### *RLPA Fails to Satisfy the Enumerated Power Requirement*

RLPA is ultra vires. There is not a single statute that provides a model for RLPA's claim to be grounded in either the Spending Clause or the Commerce Clause. Congress has not identified any specific arena of spending or commerce. Rather, it has identified all religious conduct as its target and attempted to cover as much religious conduct as possible by casting a net over all federal spending and commerce. See Hearings, H.R. 4019, The Religious Liberty Protection Act, Subcommittee on the Constitution, House Committee on the Judiciary (June 16, 1998). Like RFRA, its obvious purpose is to displace the Supreme Court's interpretation

<sup>1</sup> Professor Douglas Laycock tilts at windmills when he attempts to argue that the test instituted by RLPA (and RFRA), the compelling interest/least restrictive means test, was the test regularly employed in all free exercise cases before 1990. He neglects to mention *Turner v. Safley*, 482 U.S. 78 (1987), which makes explicit that strict scrutiny does not apply in the prison context or any of other cases in which the Court demonstrated great deference to government interests. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986), *Bowen v. Roy* 476 U.S. 693 (1986). Whatever Professor Laycock's interpretation of the Supreme Court's free exercise jurisprudence may be, the Supreme Court itself made absolutely clear in *Boerne v. Flores* that the least restrictive means test is "a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 117 S. Ct. at 2171.

of the Free Exercise Clause in as many fora as possible. It is a transparent end-run around the Supreme Court's criticism of RFRA in *Boerne v. Flores*.

The specious argument that Congress may grant religion this windfall under the Commerce Clause because religion generates commerce attempts to transform the First Amendment, a limitation on congressional power, into an enumerated power.

#### *RLPA Violates the Establishment Clause*

RLPA privileges religion over all other interests in the society. While the Supreme Court indicated in *Smith* that tailored exemptions from certain laws for particular religious practices might pass muster, it has never given any indication that legislatures have the power to privilege religion across-the-board in this way.

RFRA's and RLPA's defenders rely on *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), for the proposition that government may enact exemptions en masse. This is a careless reading of the case, which stands for the proposition that religion may be exempted from a particular law (affecting employment) if such an exemption is necessary to avoid excessive entanglement between church and state. RLPA, like RFRA, creates, rather than solves, entanglement problems. RLPA, which was drafted by religion for the purpose of benefitting religion and has the effect of privileging religion in a vast number of scenarios, violates the Establishment Clause. For the Court's most recent explanation of the Establishment Clause, see *Agostini v. Felton*, 117 S.Ct. 1997 (1997).

The following is a list of interests that will be affected adversely if RLPA is adopted because it elevates religion above all other societal interests. As Oregon recently discovered when a prosecutor attempted to prosecute a religious community for the death of three children, particular exemptions from general laws can have real consequences. This is a zero-sum game: by granting religion expansive new power against generally applicable, neutral laws, Congress inevitably subtracts from the liberty accorded other societal interests.

Before blindly passing this law with its mandate to exempt religion from general laws in an infinite number of scenarios, Congress should know that it risks responsibility for harming the following constituencies:

- Children in religions that advocate and practice abuse
- Women in religions that advocate male domination
- Children in religions that refuse medical treatment, including immunizations
- Pediatricians, who have lobbied vigorously for mandatory immunizations
- The handicapped, women, minorities, and homosexuals, whose interests are currently protected by antidiscrimination laws and may well be trumped by religions exercising the compelling interest/least restrictive means test
- Departments of correction and prison officials attempting to ensure order in prisons populated by increasingly violent criminals
- Artistic and historical preservation interests, including whole communities that depend on historical districts for revenue and jobs
- Neighborhoods attempting to enforce neutral rules regulating congestion, building size, lot size, and on- and off-street parking
- School boards desperately attempting to ensure order and safety in the public schools
- State, local, and municipal officials who will be forced to bear the cost of accommodating every religious request (whether from a mainstream religion or a cult) or bear the cost of litigating refusals to do so
- Last, but not least, citizens who will bear the extreme increase in litigation costs created by these new rights coupled to an attorney's fees provision (a virtual invitation to sue)

In sum, RLPA is no better than RFRA. In fact, it is worse. Congress has a duty to investigate its wide-ranging effects with care before taking this plainly unconstitutional path.

For those who take comfort from the fact that RLPA is supported by a wide cross-section of religions, I leave you with the words of Framer Rufus King, one of the youngest members of the Constitutional Convention but a Harvard graduate who was highly respected on structural issues: "[I]f the clergy combine, they will have their influence on government."

Bibliography of works by Marci A. Hamilton addressing the Religious Freedom Restoration Act and *Boerne v. Flores*: *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. Penn. J. Constl. L. 1 (1998). *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 Wm. & Mary L. Rev. 699 (1998). *Religion's Reach*, Christian Century 644 (July 16-23, 1997). *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 Nexus, A Journal of Opinion 33 (1997). *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under*

*Cover of Section Five of the Fourteenth Amendment*, 16 *Cardozo L. Rev.* 357 (1994).  
*The Constitutional Rhetoric of Religion*—U. Ark. Little Rock L.J.—(forthcoming 1998).

The CHAIRMAN. Professor Eisgruber.

#### STATEMENT OF CHRISTOPHER L. EISGRUBER

Mr. EISGRUBER. Thank you. I would like to thank the committee for the opportunity to present my views this morning. In my oral remarks, I would like to emphasize three points which are made at greater length, along with some others, in my written remarks.

The first of those is that RLPA repeats a fundamental problem with RFRA by invoking the compelling State interest standard. RFRA's constitutional difficulties in the Supreme Court were very closely linked to its use of that standard. The Supreme Court said of that stringent test that it, "reflects a lack of proportionality or congruence between the means adopted and the legitimate ends to be achieved."

I think Professor Hamilton has already indicated the potentially dramatic reach of this test. I would like to supplement her remarks by calling attention to the dramatic way in which it departs from other more traditional standards used in comparable areas in American constitutional and civil rights law.

So, for example, the Americans With Disabilities Act, which this body enacted in order to protect handicapped Americans from the burdens imposed by neutral and generally applicable laws, uses the reasonable accommodation standard, not the compelling State interest standard. For example, when the Supreme Court protects expressive conduct under the Free Speech Clause from the reach of neutral and generally applicable laws—that is, those that do not specifically target speech or expressive conduct, in particular—it does use the compelling State interest test, but instead uses the much more deferential *O'Brien* standard.

Indeed, when the Supreme Court tests the constitutionality of laws that explicitly and intentionally discriminate on the basis of sex, it uses not the compelling State interest standard, but the more deferential intermediate scrutiny test. I have yet to have heard any plausible explanation as to why it is that incidental burdens upon religious conduct should be subject to a far more demanding constitutional standard than is applied to explicit and intentional sex discrimination.

The second point is RLPA's use of this stringent and extremely demanding standard would create inequalities that are certainly unfair and, in my judgment, are most likely unconstitutional under the Establishment Clause. Let me offer the following example.

Suppose that there are two mothers, each of whom sends her children to the public schools and each of whom has conscientious reasons for wishing to exempt her children from sex education classes. Suppose, though, that only one of these two parents regards her objection to sex education as religious in character.

Because public schools receive financial assistance from the Federal Government, the religiously-motivated mother might be able to invoke the statute to claim an exemption. The other mother could not. I think creating that kind of special privilege is unfair in a way that should concern this body even apart from the question of

its constitutionality. But as I said, I also think that these kinds of special privileges for participants in Federal programs on the basis of religious belief would create Establishment Clause difficulties.

I don't disagree with what has been said by my friend, Professor Laycock, who points out that under *Corporation of Presiding Bishop* Congress and other legislatures may legislate in order to remove burdens that are specially felt by religion. But as my example illustrates, RLPA sweeps much too broadly in order to fit under the doctrine of *Corporation of Presiding Bishop v. Amos*. It applies to interests and burdens which are by no means unique to religious conduct, but are equally shared by religious and non-religious conduct and interests.

A third point. RLPA makes a patently unsatisfactory attempt to circumvent the Supreme Court's decision in *City of Boerne v. Flores* by attempting to transplant the defective State interest test from one constitutional clause, section 5 of the 14th Amendment, to two others, the commerce and spending powers.

I tend to agree with Professor Hamilton that I don't think the arguments under these clauses are even going to present a hard case to the Supreme Court. Congress' use of those powers is plainly pretextual in these circumstances. Congress is pursuing the, in my view, commendable goal of trying to promote religious liberty. It is more specifically trying to advance religious conduct, but what it is not doing is trying to advance any articulable goal related in any way to the improvement or regulation of commerce or to the vast array of Federal spending programs dealing with virtually every imaginable situation.

The Court, under its jurisprudence under both the *Lopez* case in the Commerce Clause area and *South Dakota v. Dole* in the spending power area, requires a nexus between spending power goals and these sorts of conditions and between commerce power goals and these sorts of conditions being imposed by RLPA. That nexus will be found lacking in this case.

In an effort to conceal the radically novel character of RLPA, its defenders have tried to compare it to some of this Nation's great anti-discrimination statutes, such as, for example, title VI of the Civil Rights Act of 1964. In my view, such comparisons are inapt. RLPA does not prohibit discrimination. Laws which do prohibit discrimination obviously serve the purpose of Federal spending programs by ensuring that all persons can participate in them on a fair and equal basis, but that is not what RLPA does. It creates a situation in which some people participate on a privileged basis. For that reason, the civil rights statutes provide an inappropriate comparison.

The CHAIRMAN. Thank you, professor.

[The prepared statement of Mr. Eisgruber follows:]

PREPARED STATEMENT OF CHRISTOPHER L. EISGRUBER

I thank the Chair and the Committee for the opportunity to submit my views regarding the S. 2148, the "Religious Liberty Protection Act."

RLPA is a proposed effort to preserve what was valuable in the Religious Freedom Restoration Act ("RFRA"), which the Supreme Court held unconstitutional in *City*

of *Boerne v. Flores*, 117 S.Ct. 2157 (1997).<sup>1</sup> In my view (and in the view of my co-author, Professor Lawrence G. Sager<sup>2</sup>), RLPA would perpetuate the constitutional mistakes of RFRA. Indeed, as presently drafted, RLPA has defects that would make it less rather than more constitutionally acceptable than was RFRA.

#### INTRODUCTION & BRIEF SUMMARY

Religious liberty is a value of the highest order. In general, American public officials are sensitive to religious interests, and they often make commendable efforts to accommodate the needs of religious persons and practices. Nevertheless, there are undoubtedly times when officials—whether through prejudice, indifference, or misunderstanding—fail to show appropriate respect for the free exercise of religion. Congress has an important role to play in correcting these failures. If RLPA were a reasonable effort to discharge that responsibility, we would support it with enthusiasm.

Unfortunately, RLPA does something entirely different. By generating an extreme form of the “compelling state interest” test, and imposing it over a more sweeping range of cases than has ever been contemplated by the Supreme Court or by Congress, RLPA would undermine the government’s capacity to pursue perfectly legitimate, even-handed, democratically chosen goals. RLPA would affect two classes of citizens: those who have religious reasons for their actions and who would thereby be privileged to defy otherwise perfectly valid governmental regulations, and those whose reasons for acting—however laudable and heartfelt—are not religious. RLPA’s compelling state interest test goes far beyond protecting religiously-motivated people from hostility or insensitivity. Instead, it grants them special privileges, allowing them—and them alone—to claim exemption from laws with which they disagree.

Not surprisingly, Congress has no power to create the kind of special and arbitrary privileges that would result if RLPA were to become law. RLPA’s peculiar statutory architecture amounts to a tacit admission of this problem: even in an era when Congress retains broad license to act under its commerce clause and spending powers, RLPA stands out as depending upon a tenuous and improbable connection between those powers and the subject of religious liberty. Far from curing the constitutional vices of RFRA, RLPA’s somewhat desperate hunt for constitutional authority proliferates such difficulties.

Specifically, RLPA manifests five distinct constitutional vices. First, RLPA’s sweeping application of the “compelling state interest test” unconstitutionally privileges religion. Because RLPA defines “the exercise of religion” in novel and unprecedented terms, it would likely violate the Establishment Clause even if its predecessor, RFRA, did not do so. Second, Section 2(a)(1) invokes Congress’ spending power for purposes unrelated to the goals of any particular spending program. As a result, it exceeds the scope of Congress’ enumerated powers. Third, Section 2(a)(2) likewise invokes Congress’ commerce power for purposes unrelated to any goal related to interstate commerce. It, too, exceeds the scope of Congress’ enumerated powers, and so would be held unconstitutional. Fourth, Section 3(b) limits the land use authority of state and local governments in a way that bears no relationship to any plausible claims that such governments are discriminating against religion. RLPA attempts to justify these limits by relying upon Congress’ authority to enforce the Fourteenth Amendment. That effort is starkly inconsistent with the Supreme Court’s decision in *Flores*. Fifth, Section 3(a) attempts to alter the judiciary’s interpretation of the Free Exercise Clause. It thereby compromises the separation of powers and exceeds the authority of Congress under Section Five of the Fourteenth Amendment.

<sup>1</sup> *Flores* clearly invalidated RFRA with respect to the regulation of state and local government behavior. Courts have divided about whether *Flores* should be understood to invalidate RFRA with regard to regulation of federal behavior. Yet, regardless of whether RFRA’s federal applications survived *Flores*, we expect that the federal courts should, and will, ultimately declare them to be unconstitutional. For reasons that are equally applicable to RLPA and so are discussed in this memorandum, we believe that RFRA is unconstitutional under the Supreme Court’s Establishment Clause doctrine.

<sup>2</sup> Professor Sager is the Robert B. McKay Professor of Law at New York University School of Law. This testimony was prepared by the two of us working jointly, and it reflects arguments that he and I have developed together as part of a collaboration spanning several articles.

## I. Establishment Clause Issues

### I.1 The Compelling State Interest Test

Like RFRA before it, RLPA incorporates the “compelling state interest” test. That test appears in Section 2(b) of RLPA, and it is the heart of the proposed legislation. It was also the heart of RFRA—and of RFRA’s constitutional difficulties. The Supreme Court held that RFRA was an invalid exercise of congressional power because the compelling state interest test was poorly tailored to Congress’s legitimate goals. In the words of the Court, “The stringent test [RFRA] demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.” 117 S.Ct. at 2171.<sup>3</sup>

The Court’s judgment in *Flores* was not surprising. If honestly applied, the “compelling state interest test” is the most demanding standard known to constitutional law. Accordingly, the test is suitable only where it is appropriate to entertain a broad presumption of unconstitutionality—where, in other words, almost all of the cases that trigger the test will be abhorrent to the best standards of government behavior. Such a presumption rightly applies, for example, to laws intended to censor speech or to discriminate against racial or religious minorities. This presumption is badly suited to religious exemption cases, however. Many perfectly sound, even-handed laws will impose incidental burdens on some religious practices. The breadth and variety of religious belief make such collisions inevitable; but this does not offer a reason for depriving ourselves of the capacity to govern. Nor does the mere fact that a person’s conduct is motivated by religious belief offer a good reason for permitting that person to defy reasonable, even-handed laws.

In American law, RLPA’s use of the “compelling state interest” test is an astonishing anomaly. To my knowledge, neither the Constitution nor any civil rights statute invokes anything like the “compelling state interest” test to protect people from incidental burdens that result from neutral and generally applicable laws.<sup>4</sup> For example, when laws do not regulate speech directly, but impose incidental burdens upon it, the Supreme Court does not measure them against the compelling state interest test; instead, it uses the much more deferential standards, such as the one articulated in *United States v. O’Brien*.<sup>5</sup> When Congress sought to provide disabled Americans with relief from burdens imposed upon them by neutral and generally applicable laws, it used the “reasonable accommodation” standard, not the compelling state interest test.<sup>6</sup> Indeed, even when laws explicitly and intentionally discriminate on the basis of sex, the Supreme Court refuses to employ the compelling state interest test; instead, the Court employs a less demanding test, known as intermediate scrutiny.<sup>7</sup> No proponent of RLPA or RFRA has ever offered any sensible reason why incidental burdens upon religious conduct should be treated pursuant to a standard so different from the ones used in every comparable area of American civil rights law.

In the debate over RFRA, the degrees to which it was alien to our constitutional tradition was obscured by a misreading of the Supreme Court’s religious liberty jurisprudence in the three decades preceding the Court’s decision in *Department of Employment Services v. Smith*, 474 U.S. 872 (1990). During that period, the Court gave lip-service to the proposition that government behavior that penalized persons for doing that which was essential to their religious commitments should be measured against the rigors of the compelling state interest test.

Yet, while the Court spoke broadly, it acted extremely narrowly. Only one isolated group was ever permitted to defy a general legal rule on the basis of the compelling interest test. That was the Amish, who were permitted to direct the development

<sup>3</sup> Professor Lawrence G. Sager and I have extensively criticized RFRA’s use of the “compelling state interest” test. Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994); see also Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty after City of Boerne v. Flores*, 1997 S.Ct. Rev. 79 (1997).

<sup>4</sup> For example, Title VII “disparate impact” analysis involves a very demanding standard: once a plaintiff shows that a business practice has a “disparate impact,” the employer has the burden of proving that the challenged practice is a “business necessity.” See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The test applies even in the absence of discriminatory intent; in that sense, it is among the most demanding known to American civil rights law. This stringent test comes into play, however, only after a showing of “disparate impact.” RLPA, by contrast, triggers upon a showing of a “substantial burden”—and it applies even to laws that impose comparable burdens upon non-religious conduct.

<sup>5</sup> 391 U.S. 367 (1968).

<sup>6</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12112(b)(5)(A) & 12182(b)(2)(A)(ii) (1994).

<sup>7</sup> See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

of their teenage children outside the framework of what the State of Wisconsin recognized as a school. One other group prevailed in the Court's many pre *Smith* exemptions cases. The Court protected people who were presumptively entitled to claim unemployment insurance benefits; who had deep religious reasons for refusing an available job; and who faced a serious danger that those reasons might be treated with hostility by state bureaucrats. Outside of these two small groups, every other attempt by any religious person or group to invoke the compelling state interest test failed. In every other branch of constitutional jurisprudence, the compelling state interest test was strict in theory, but fatal in fact; here it was strict in theory but notoriously feeble in fact. The *Smith* Court did not cause or even precipitate the test's demise. The Court merely announced what had long been true. RFRA thus purported to "restore" a test that had never in fact been consistently applied by the Court.<sup>8</sup>

### 1.2. RLPA's Establishment Clause Problems

As applied in RFRA and RLPA, the compelling state interest test indefensibly favors religious commitments over the other deep concerns and interests of members of our society—concerns and interests like the welfare and integrity of one's family, deep moral and political commitments not recognizably grounded in religious beliefs, and professional, artistic and creative projects to which individuals may be passionately committed. Imagine, for example, two mothers, both of whom have conscientious reasons for wanting to exempt their children from sex education classes, but only one of whom conceives of her reasons as the product of religious belief. Because public schools receive federal funds, religiously motivated objections to public school curricular decisions would almost certainly be justifiable under RLPA. Under RLPA, the religiously motivated mother might compel a public high school to exempt her children from its sex education classes, but the second mother would have no claim—even if her reasons were thoughtful, sincere, and deeply felt.

The idea that some persons are entitled to ignore the laws that others are required to obey, and that this privilege depends upon the actors' system of beliefs, is both extraordinary and transparently inconsistent with our constitutional values. Indeed, in two cases the Supreme Court has held laws unconstitutional because they granted special privileges to religiously motivated persons. In *Texas Monthly, Inc. v. Bullock*,<sup>9</sup> the Court struck down a Texas law that exempted religious publications from a sales tax applicable to other publications. In *Thornton v. Caldor*,<sup>10</sup> the Court held unconstitutional a Connecticut law which gave all religious employees the right not to work on their Sabbath.

Of course, Congress and the state legislatures retain the authority to "accommodate religious needs by alleviating special burdens,"<sup>11</sup> When doing so, however, legislators must respect the "neutrality" commanded by the Religion Clauses.<sup>12</sup> In many cases, the only appropriate form of accommodation will benefit religious and non-religious interests alike—as is the case, for example, with tax exemptions that benefit both religious and non-religious organizations. On rare occasions, religious institutions and persons may be uniquely susceptible to prejudice or insensitivity; in such circumstances, Congress and the states may craft special exemptions that respond to those unique needs.<sup>13</sup> RLPA fits neither of these constitutionally permissible models. On the one hand, RLPA sharply discriminates between religious and non-religious behavior. On the other hand, RLPA applies to an indiscriminate variety of government actions, reflecting no effort whatsoever to discern when religious persons and institutions might have genuinely special needs.

### 1.3. RLPA's Novel and Unprecedented Definition of the Exercise of Religion

RLPA exacerbates RFRA's Establishment Clause problems. Through its extraordinarily capacious definition of the exercise of religion RLPA extends the potential coverage of the compelling state interest test to a far wider range of cases than was

<sup>8</sup> It is arguable that RFRA stipulated a more sweeping form of the compelling state interest test than had ever been even the nominal rule in the Supreme Court. That is the Supreme Court's own view: in *Flores*, the Court said that RFRA imposed "a least restrictive means requirement \* \* \* that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Flores*, 117 S.Ct. at 2171. This claim is controversial; critics of *Flores* point out that the "least restrictive means" requirement was invoked in *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), RLPA, like RFRA, explicitly imposes a "least restrictive means" requirement.

<sup>9</sup> 489 U.S. 1 (1989).

<sup>10</sup> 472 U.S. 703.

<sup>11</sup> *Kiryas Joel Bd. of Education v. Grumet*, 512 U.S. 687, 705 (1994).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327 (1987). *Amos* upheld, against an Establishment Clause challenge, provisions exempting churches and other religious employers from the scope of federal law prohibiting discrimination on the basis of religious belief.

ever contemplated by the Supreme Court's most sweeping statements. Section 6(1) of RLPA defines "religious exercise" to mean "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." RLPA also amends RFRA to incorporate the new language. Section 7(a)(3). This definition is new. It appeared neither in RFRA nor in the Supreme Court's pre-*Smith* jurisprudence. Under RFRA, few courts had insisted that religious exercise be "compulsory" in order to trigger the statute's provisions, but most courts had held, in effect, that RFRA applied only to "substantial burdens" upon beliefs which were in some way and to some degree "important" to religious believers.<sup>14</sup>

RLPA's definition of religious exercise threatens to increase the extent to which RFRA favored religion over non-religion. Under RFRA, it was possible to argue that a burden upon religious exercise was not "substantial" if it affected only optional practices for which adequate substitutes were available. For example, under RFRA, several churches running soup-kitchens in residential neighborhoods sought zoning exemptions which, they conceded, were unavailable to comparably situated secular charities. In these cases, it was possible to argue that no "substantial burden" upon religious practice existed: the churches were free to run soup-kitchens in other locations, and they were free to engage in other charitable practices which, as a matter of their own religious doctrine, were equally worthy. See, e.g., *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1560 (MD Fla. 1995). When successful arguments of this kind mitigated the RFRA's favoritism for religion.

It is not clear that these arguments would remain available under RLPA. To be sure, Sections 6(1) and 7(a)(3) define "religious exercise," not "substantial burden." Courts might find burdens upon religious exercise insubstantial if they affected only unimportant practices or if they left religious believers other, equally acceptable means by which to pursue their religious convictions. That construction of the "substantial burden" test, however, might render Section 7(a)(3) nugatory; if so, courts would be loathe to accept it. For that reason, RLPA exacerbates RFRA's already troubling disparity between the treatment of religious and non-religious interests. RLPA might fail to survive scrutiny under the Establishment Clause even if RFRA (without RLPA's amendments) could have done so.

## II. Federalism Issues

### II.1. Spending Power Issues

Section 2(a)(1) of RLPA attempts to regulate the ability of state and local governments to "substantially burden \* \* \* religious exercise \* \* \* in a program or activity \* \* \* that receives federal financial assistance." That Section is an effort to draw upon Congress' spending power. The Supreme Court has held that Congress has broad discretion to impose conditions upon the use of federal money by state and local governments. The leading case is *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, the Court upheld a statute which provided that states would lose federal highway funds if they did not raise the drinking age to 21. South Dakota objected to the statute on the ground that, under the Twenty-First Amendment, liquor laws were a matter of state rather than national control. The Supreme Court rejected this argument, reasoning that states could retain control over their drinking ages if they were willing to reject the offer of federal funds.

The Court's construction of the spending power in *Dole* was generous, but it was not unlimited. The Court emphasized that "our cases have suggested (without significant elaborations) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"

<sup>14</sup>See, e.g., *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) ("a substantial burden on the free exercise of religion \* \* \* is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that maintains a central tenet of a person's religious belief, or compels conduct or expression that is contrary to those beliefs"), *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (to meet the substantial burden standard, plaintiffs must point to a burden that is "more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." (quoting *Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680 (1988)); *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) ("To exceed the 'substantial burden' threshold, government regulation 'must significantly inhibit or constrain conduct or expression that manifests some central tenet of \* \* \* [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion'" (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (brackets and ellipses added by the Thiry Court)); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden results if a government action "leaves ample avenues open for plaintiffs to express their deeply held beliefs)").

In *Dole*, the Court reasoned that “the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.” By raising the drinking age, the Court suggested, states would further the purposes of federal transportation law. Yet, unless *Dole’s* nexus requirement is entirely meaningless, RLPA cannot possibly satisfy it. RLPA applies to all religious conduct and it applies to all federal spending programs. It defies belief to think that accommodating religious conduct, regardless of its nature, supports the goals of every federal expenditure, regardless of its purpose. Indeed, RLPA’s compelling state interest test is blatantly inconsistent with that idea: it would require states to accommodate religious conduct even at the expense of the core goals of any given program unless those goals rose to the level of a “compelling state interest.”

In effect, RLPA assumes that once federal dollars touch some activity or program, the activity or program is federalized top-to-bottom: it then becomes fair game for congressional regulation regardless of whether the regulation has anything to do with the federal government’s initial spending program. That is not what the Supreme Court said in *Dole*, and it is not a sensible reading of the Constitution.

In an effort to minimize RLPA’s novelty, its proponents have compared it to anti-discrimination statutes. They mention, for example, Title VI of the Civil Rights Act of 1964, which provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>15</sup> Some of RLPA’s proponents go so far as to suggest that if Congress lacks authority under the Spending Clause to enact RLPA, then it would also lack authority to enact statutes like Title VI. Yet, RLPA cannot be compared to Title VI or any other anti-discrimination statutes. Anti-discrimination provisions, like those in Title VI, obviously promote the goals of federal spending programs; they ensure that all intended beneficiaries of those programs may participate in them on fair and equal terms.<sup>16</sup> RLPA, by contrast, is nothing like an anti-discrimination statute. It does not ensure that all Americans will be able to participate in federally funded programs on equal terms; on the contrary, it creates special privileges for some participants and denies them to others.<sup>17</sup>

## II.2. Commerce Clause Issues

Section 2(a)(2) of RLPA attempts to regulate the ability of state and local governments to “substantially burden religious exercise in or affecting commerce.” That Section is an effort to draw upon Congress’ commerce power. The Court has construed the commerce power generously including, of course, in connection with congressional efforts to prohibit discrimination. The case most often cited in this connection is *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *McClung*, the Court upheld application of Title II of the Civil Rights Act of 1964 to Ollie’s Barbecue, a restaurant in Birmingham, Alabama. The Court said Congress had power to prohibit race discrimination by Ollie’s Barbecue on the following theory: by refusing to serve African-Americans, Ollie’s Barbecue diminished the volume of business it did, and it thereby diminished demand for food products that moved in interstate commerce. The effect of one restaurant’s actions might be small, but Congress was entitled to consider the aggregate effects of all restaurants similarly situated.

*McClung* grants Congress expansive authority, but that authority is not unlimited. Even in *McClung*, the Court insisted that Congress must identify some “connection between discrimination and the movement of interstate commerce.” The Court upheld Title II only because the legislative record included “ample basis for the conclusion that \* \* \* restaurants \* \* \* sold less interstate goods because of \* \* \* discrimination.” It is impossible to imagine, much less substantiate, any such basis for RLPA. Religious conduct varies tremendously and unpredictably. From the

<sup>15</sup> 42 U.S.C. § 2000d et. seq.

<sup>16</sup> This argument for Congressional authority is sufficient, but hardly necessary; Congress would obviously have power to enact Title VI pursuant to other powers, including the power conferred by Section Five of the Fourteenth Amendment.

<sup>17</sup> RLPA’s use of the Spending Power may also raise additional Establishment Clause problems beyond those discussed above. RLPA in effect uses every federal spending program as a device to favor religion. The use of spending programs to favor religion (and only religion) has always been regarded as a paradigmatic example of an Establishment Clause violation. We believe that Section 2(a)(1) of RLPA would be clearly unconstitutional on this ground alone. This point is in fact related to the absence of any nexus between RLPA and the purposes of particular government spending programs. Were there such a nexus, it might be difficult to say that RLPA was designed only to benefit religion: it could be regarded as incidental to the goals of some particular program (say, an anti-discrimination program or a cultural affairs program) which bore a plausible relationship to some forms of religious conduct. Absent that nexus, however, RLPA is nothing more than a naked effort to use government spending to improve the position of religious persons and institutions.

standpoint of interstate commerce, religious activity is a random vector. There is no reason to believe that it promotes, diminishes, obstructs, or facilitates interstate commerce. Nor is there any reason to think that requiring government to accommodate religion would have any predictable effect whatsoever upon interstate commerce.

The theory of Section 2(a)(2) of RLPA is largely parallel to the theory of Section 2(a)(1): it presupposes that once the congressional commerce power touches some activity or practice, that activity or practice becomes federalized top-to-bottom: it becomes fair game for congressional regulation regardless of whether the regulation has anything to do with promoting interstate commerce or improving the quality of interstate commerce. That is not what the Supreme Court said in *McClung*. It is flatly inconsistent with the Supreme Court's recent decision in *United States v. Lopex* 115 S.Ct. 1624 (1995), which held, *inter alia*, that Congress cannot regulate guns simply because they at one time entered the stream of interstate commerce.

### *II.3. Issues Pertaining to Section Five of the Fourteenth Amendment*

In Section 3(b), RLPA purports to limit the zoning authority of state and local governments. This Section of RLPA appears under the heading, "Enforcement of the Free Exercise Clause." It is meant to apply to all land use cases, not just those where the legislation's dubious invocations of the spending and commerce clause are apt. Apparently, this Section, like RFRA before it, depends for its validity on Congress' power to enforce the Fourteenth Amendment. That power was, of course, the focus of the Supreme Court's decision in *Flores*. There, the Court emphasized that Section Five does not permit Congress to displace the Court's judgments about the content of constitutional rights. Exercises of power under Section Five are valid only so long as they serve to put in place a scheme of remedies for rights which the Court itself is willing to recognize. *Flores*, 117 S.Ct. at 2163-64, 2171-72.

In *Flores*, the Court emphasized that "Congress must have wide latitude in determining" what measures are well-suited to remedy constitutional violations. *Id.*, at 2164. Nevertheless, Section 3(b) of RLPA unquestionably repeats the vices that proved fatal to RFRA. Section 3(b) involves a sweeping and unwarranted federalization of local decision-making. It is no exaggeration to say that, under RLPA, any encounter between a religious organization and a local zoning authority would become a matter for federal adjudication. This remarkable preemption of local authority cannot be defended as a reasonable mechanism to remedy or prevent discrimination against religious interests. No doubt zoning administrators sometimes abuse their authority to harm unpopular churches. But that problem is not reasonably attacked by extending all churches—no matter how rich, how powerful, or how favored in law—a blanket writ to challenge the zoning ordinances which every other citizen and institution must respect. What the Court said about RFRA is equally true of Section 3(b) of RLPA: "The stringent test [it] demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." 117 S.Ct. at 2171. Section 3(b) of RLPA is therefore starkly unconstitutional under *Flores*.

### *III. Separation of Powers Issues*

Section 3(a) contains a remarkable assault on the judiciary's authority to make independent judgments about the meaning of the Constitution. It presumes, under the guise of enforcing the Fourteenth Amendment, to articulate "presumptions" which courts must, respect when applying its First Amendment jurisprudence. In particular, the Section purports to increase the government's burden of persuasion in Free Exercise Clause cases. Because Section 3(a) attempts to deprive the courts of the authority to interpret the Constitution, it is patently unconstitutional. There are two doctrinal paths to that conclusion. The simplest runs through *Flores*. The Court said clearly in *Flores* that Congress may not use its Fourteenth Amendment powers to alter the substance of the Court's interpretations of the Fourteenth Amendment. Section 3(a) of RLPA offends this conclusion more blatantly than RFRA did, and the Court would undoubtedly find it unconstitutional.

There is, however, an even more fundamental doctrinal objection to Section 3(a). In *United States v. Klein*, 80 U.S. (3 Wall.) 128 (1871), the Supreme Court held that Congress may not specify a "rule of decision" for courts. Courts must be able to decide for themselves how to apply statutes or the Constitution. In the realm of statutory interpretation, *Klein* is difficult to apply: in some sense, of course, Congress specifies a "rule of decision" for courts every time it writes a statute. Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 470 (1994). RLPA, however, is a textbook violation of *Klein*. It attempts to compel judges to respect Congress' judgment, rather than their own, when interpreting the Constitution. And it forces judges to

act as though they had adopted Congress' constitutional judgment as their own. Congress has the power and responsibility to arrive at its own view of constitutional substance, of course. But Congress is obliged to permit the Court this same independence of judgment.

#### CONCLUSION

RLPA's constitutional defects are not technicalities. On the contrary, they all reflect strong claims on the policy judgment of the members of Congress who wish to act on behalf of religious liberty. Congress may well want to assure that religiously-motivated persons are treated fairly and that their interests are reasonably accommodated. But Congress surely does not want to sweepingly favor religiously-motivated persons over the vast majority of citizens conscientiously leading their lives, and to do so at the expense of the democratically-shaped rule of law. Likewise, Congress surely does not want to generate what Justice Kennedy in *Flores* correctly characterized as "\* \* \* a considerable intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." And finally, Congress should want to act as the Supreme Court's partner in the pursuit of political justice for American citizens, not as its adversary. That is the admirable tradition into which, for example, Title VII and the Voting Rights Act fall. RFRA was a false start, and Congress need not and should not perpetuate RFRA's mistakes.

Of course, RFRA was motivated by a legitimate and important goal: the goal of assuring that religiously-motivated conduct is reasonably accommodated, that governmental actors are not insensitive or hostile to religious beliefs and commitments. Congress has an extremely important role to play in pursuing that goal. It can play that role in two different ways.

First, Congress can continue to police state and federal conduct for egregious failures of the duty of reasonable accommodation and correct those failures. This is a role that Congress has traditionally played to the great benefit of constitutional justice in the United States. Thus, for example, Congress directed the armed forces to make reasonable accommodations for the wearing of religiously mandated apparel (see 10 U.S.C. § 774); and thus, Congress withdrew funding for a Forest Service road that would have harmed a sacred Native American site (see House Committee on Appropriations, Dept. of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Congress, 2d Sess. 72 (1988)); and thus, Congress has provided church employers with exemptions from certain tax obligations that are inconsistent with their religious beliefs (see 26 U.S.C. § 3121(w)(1)); and thus, Congress acted to specifically assure members of the Native American Church the ability to use Peyote as part of their sacrament of worship (see 42 U.S.C. § 1996). This effort requires ongoing vigilance and nuance of legislative response, but Congress' performance in this context has been superb.

And second, Congress can enact more general legislation that offers broad protection to religiously-motivated persons against the possibility that their beliefs and commitments will be treated with insensitivity or hostility. RLPA's supporters have presented Congress with a false dichotomy. They have wrongly suggested that Congress must choose between, on the one hand, uncritical deference to all neutral, generally applicable laws (as the *Smith* rule appears to contemplate), and, on the other hand, the unfair privileges that inevitably result from applying RLPA's compelling state interest test. In fact, there is ample middle ground—as Congress has rightly recognized when enacting civil rights statutes dealing with other topics (such as the rights of the handicapped).<sup>18</sup>

What is critical to recognize for the moment is that RLPA is not such legislation. RLPA offers a distorted and untenable view of what religious liberty is, a view that Congress on reflection should not endorse; and RLPA stretches notions of congressional authority to their breaking point, inviting the judicial articulation of constitutional limitations that Congress should not welcome. RLPA is unconstitutional, and if it were enacted, the Court would find it so to be. Congress has good reasons at the outset to choose a different vehicle to realize its altogether laudable concern for religious liberty.

The CHAIRMAN. Professor McConnell, we will turn to you now.

<sup>18</sup> Professor Michael McConnell has suggested that statutes protecting the handicapped provide the best analogy for statutes protecting the special needs of religious persons. Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1140 (1990).

**STATEMENT OF MICHAEL W. McCONNELL**

Mr. McCONNELL. Thank you, Mr. Chairman. I appreciate the invitation to be here today. I have prepared testimony which, with your permission, I will submit for the record.

The CHAIRMAN. Without objection.

Mr. McCONNELL. But I think it might be useful to engage other members of the panel and respond to some of the arguments that you have just been hearing rather than my repeating that.

The CHAIRMAN. We will put all full statements in the record of all witnesses here today, and any additional information that they can submit to us we would like to have.

Go ahead.

Mr. McCONNELL. Thank you, Mr. Chairman. I would like to devote most of my time to questions of constitutionality rather than questions of policy which I believe the Congress thoroughly considered back at the time of RFRA, and in no way different today. But just one brief comment about policy before moving in that whenever I hear these arguments about how terrible protection for religious liberty would be, we always hear trotted out spousal abuse and failure to vaccinate children and high crimes and misdemeanors of various sorts; you know, the worst possible cases, cases, of course, that no court would ever have to think twice about.

I am just glad that the Free Speech Clause is not before this panel today. I can just imagine the testimony you would be receiving about the Free Speech Clause which, after all, is so sweeping, Mr. Chairman; it is so broad. It applies to everything that State and local governments do. It micromanages their every affair where, of course, free speech rights might be concerned.

I can imagine the testimony about death threats which, after all, are speech, or the regulation of the legal profession which, after all, impinges upon speech, or perhaps fraud in vacuum cleaner sales where, if we have a Free Speech Clause, then the courts are going to be troubled with all of these cases with these freedom of speech claims in order to avoid legitimate regulation.

Mr. Chairman, I don't think that the arguments about RLPA have any more validity today than arguments of this sort about the Free Speech Clause. The courts are perfectly capable of distinguishing between legitimate claims of religious freedom and cases which involve spousal abuse and other high crimes and misdemeanors.

Professor Eisgruber has a somewhat more moderate position. I should respond to that as well. He says, well, why not use standards that we have seen in some mildly parallel cases, such as reasonable accommodation. Well, there is a very good reason why the Congress should not use the term "reasonable accommodation" instead of the compelling interest test, and that is that that is, in fact, the language used for religious claims under title VII. And the Supreme Court, in *TWA v. Hardison*, interpreted that to mean that no accommodation is reasonable if it imposes more than a trivial burden on the other side. That statute has turned out to be, therefore, virtually a dead letter. For Congress to use the same language now would mean that it would be creating yet another dead letter.

Now, perhaps it should use the term "intermediate scrutiny." In my opinion, that would be perfectly appropriate. It would not, however, I think, lead to different results under the Religious Liberty Protection Act. If you look at the way the compelling interest test was, in fact, interpreted under RFRA or in the Supreme Court in other cases before *Smith*, the compelling interest test was not given the same kind of force that those words mean in some other legal contexts.

Instead, it has been interpreted as meaning something very akin to an intermediate scrutiny test; that is that there have been no claims that have been accepted where the government's interest has been an important or a substantial one. And so I think that this quibbling over the precise language of the test is really rather fruitless.

Let me turn now to the constitutional questions. We have been told that all you have to do is read the *Boerne* decision and *Marbury v. Madison*, and that the thing that makes this unconstitutional is that Congress is attempting to overturn the Supreme Court. This seems to me to be an entirely misguided suggestion.

There are any number of rights which are protected by statute even though they are not constitutional rights, and invariably they are protected. When protected in Federal law, they are protected under what? They are protected under the commerce power and the spending power, occasionally section 5 in the voting rights area, but predominantly commerce power and spending power.

For example, the Supreme Court held that age discrimination is not, in general, unconstitutional; that is, laws that classify according to age are subject to reasonableness or rational basis scrutiny, just as generally applicable laws impinging on the free exercise of religion are subject to that, an exact parallel to the *Smith* case. But does that stop Congress from being able to pass the Age Discrimination Act within its commerce power? Certainly not.

Similarly, the 14th Amendment does not apply to the private employment of private actors. The Supreme Court held that in the civil rights cases and in numerous other cases. Does that stop Congress from extending that kind of a protection under Title VII of the Civil Rights Act within the commerce power? Certainly not.

There is nothing unusual or exceptional or in the slightest bit odd, even, about Congress extending statutory rights under its Commerce and Spending Clause powers that have not been recognized by the Supreme Court as constitutional rights, and it would be astonishing if a court were to find that this proposed legislation were constitutional on any of those grounds.

That leaves only the Establishment Clause argument, and here we hear so many different versions of the argument it is a little hard to know quite what the point is. At several stages, we hear that there may be something constitutionally problematic about treating religious claims with greater protection than we treat comparable non-religious claims.

So, for example, a parent with a non-religious objection to sex education might be unfairly treated, or perhaps even unconstitutionally treated if she did not have the same basis for complaint that a religious parent might. That is an interesting example because I think both parents probably do have constitutional rights

under the rights of parents to control education, and where it has been tested in the State courts, both secular and religious parents have generally succeeded in getting their children exempted from sex education.

But as a general proposition, the notion that the Free Exercise Clause requires that religion receive no protection that comparable secular commitments, secular ideologies, for example, receive is contrary—we don't even have to go beyond the text and history of the First Amendment to see how bizarre a claim this is. Read the First Amendment. It says Congress shall pass no law prohibiting the free exercise of religion.

Whether *Smith* is rightly decided or wrongly decided, whatever the Free Exercise Clause might mean, it is the free exercise of religion. It is not the free exercise of various kinds of secular philosophy or other kinds of commitments. The very Free Exercise Clause itself singles out religion for protection that other comparable commitments don't.

Now, under the theory we have heard from my friends this morning, the First Amendment itself violates the First Amendment. I submit that Congress need not concern itself too much with an argument of that sort. And let me add, by the way, that this is not some kind of accident of language. If you look at the various drafts of what is now the First Amendment that were considered by the first Congress, they considered language other than "free exercise of religion." There were a series of drafts which protected free exercise of religion and freedom of conscience.

Now, "freedom of conscience" might have a broader than "free exercise of religion." Different dictionaries of the day have different meanings for "conscience," but the point is that they considered it, they voted on the successive drafts, and they specifically adopted this narrower word, "religion," the free exercise of religion and the establishment of religion. So the notion that other kinds of conscience must under the First Amendment be treated the same way as religion certainly has no grounding in the text or history of the Constitution.

As for the idea that it is somehow unfair to protect the free exercise of religion without protecting comparable secular commitments, I don't think we have to look very much farther than this Nation's tradition that religious commitments and religious exercise, in fact, are something that our culture, our society, has protected more so than other matters.

But beyond that, I think it is important to recognize the way in which the First Amendment does create a balance because just as religion receives special protection under the Free Exercise Clause from government action that would impede religion, the Establishment Clause prevents religions from going into Congress or the State legislatures and getting special supports or benefits.

So, for example, let's think of the conscientious environmentalist who has a really serious secular commitment to environmentalism, but is not protected by the Free Exercise Clause. Professor Eisgruber says that is unfair. But by the same token, the environmentalist can come into Congress or the State legislatures and get laws passed enforcing environmentalism, creating an environmental protection agency. We can have environmental classes prop-

agandizing for environmentalism and conservation in the public school. No problem.

Religion is special. It is special not just with respect to protection for free exercise. It is also special for protection against actual government advocacy and support under the Establishment Clause. These two things balance out.

Now, if Professor Eisgruber and Professor Hamilton are right and that it is unconstitutional to protect religion, to single out religion when it comes to protection, I don't hear either of them saying that it is unconstitutional to single out religion under the Establishment Clause. So look at the lop-sided First Amendment that would be created if their view were true. It would mean that whenever Congress was trying to protect the exercise of religion that it is unconstitutional. But, of course, whenever the Congress was trying to advocate or support religion, that is unconstitutional, too. What an engine for secularization, right? You can never protect and you can never—you can't protect against burdens, but when it comes to benefits, well, you know, that is unconstitutional.

One final point on this. I think that it is so unworkable and so impractical to suggest that protections appropriate for the exercise of religion be extended to all secular, non-religious commitments that it would essentially make protection for any commitment impossible.

Take, for example, just a recent—I read in the Wall Street Journal that an Army base made special rules for Muslim soldiers during Ramadan. As you know, they fast and do not drink water during the day during the month of Ramadan, and the military commander made certain changes in the physical regimen for Muslim soldiers on the base during Ramadan.

You might say—and I think Senator Sessions, if he were still here, would say, well, that is just common decency. We know that these people are engaged in an act of worship and so we make some accommodation to make sure that they are able to do that. Well, if Professor Eisgruber and Professor Hamilton were correct, what that base commander did was not respect the traditions of religious freedom in this country, but was rather unconstitutional. And every soldier who was able to come up with a reason of any sort, philosophical, political, personal, cultural, aesthetic, professional, whatever it happens to be, is able to claim the same thing. What is the base commander's reaction going to be? He is going to have to say rules are rules.

So to say that this is too narrow a protection may sound very liberal and gracious, and we need to extend freedoms more broadly. But the practical effect is going to be it is going to have to shut down the protection for the most important historically traditionally protected core of liberty in America, which is religious liberty.

The Establishment Clause argument here, I think, is one that Congress needs to carefully think about the implications and realize how dangerous a doctrine it is. This country's tradition of religious freedom would carry on. As Senator Sessions was saying, just through ordinary human decency, we would have a great deal of protection for religion freedom, not complete. Non-mainstream religions would be less well treated. It would be consistent. There would be times when zealots and bureaucrats would say no, but we

would have a great deal of protection for religious freedom as we always have.

But if we adopt this view that the Establishment Clause makes it unconstitutional to accommodate religion, when we do not accommodate comparable non-religious forms of commitment, that would be truly a dramatic change in our traditions and a dramatic diminution in the liberties accorded to all Americans.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McConnell follows:]

PREPARED STATEMENT OF MICHAEL W. MCCONNELL

Mr. Chairman, and members of the Committee. Thank you for this opportunity to discuss the constitutional issues involved in the proposed Religious Liberty Protection Act ("RLPA"). I appear today in my capacity as a legal scholar and professor of constitutional law. I do not represent any party, and nothing that I say should be attributed to the University of Utah or to any other institution.

I have studied the proposed bill, read testimony from the House hearings, and considered the bill in light of recent precedents, particularly *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). With all respect to those academics who have expressed a contrary opinion, the proposed bill is plainly constitutional on its face and as applied to most, if not all, probable applications. There is no plausible basis for constitutional challenge under existing precedents of the Supreme Court.

SEPARATION OF POWERS AND FLORES

RLPA stands on an entirely different constitutional footing from the Religious Freedom Restoration Act (RFRA), which was held unconstitutional in *Flores*. In its application to state and local government action, RFRA rested entirely on Section Five of the Fourteenth Amendment. Section Five vests in Congress the power to "enforce" the provisions of the Amendment, including, by incorporation, the provisions of the Bill of Rights; but it does not vest in Congress any power to pursue values or objectives—however worthy—other than the enforcement of constitutional rights. The *Flores* decision held that, since RFRA went significantly beyond the enforcement of free exercise rights as those rights had been defined in *Employment Division v. Smith*, 494 U.S. 872 (1990), it was beyond the powers of Congress. *Flores* did not suggest—and no other precedent of the Court suggests—that there is anything improper about the congressional objective of protecting religious freedom beyond the constitutional minimum, so long as Congress does so through other constitutionally vested powers.

For the most part, RLPA does not purport to protect religious liberty as a constitutional right. Rather, it states as federal policy that religious liberty must be respected within all programs receiving federal financial assistance, and within all areas governed by federal law under the Commerce Clause. In this respect, it is constitutionally indistinguishable from laws requiring all programs or activities within federal power to minimize adverse impact on the environment or to accommodate persons with disabilities. Protection of the environment and accommodation of disabilities are not a constitutional right; nor is protection of religious freedom as defined by the bill. Each, however, is an important human value that Congress may promote to the full extent of its constitutional powers.

Only Section 3 of the bill protects religious freedom as a constitutional right, and since it is confined to free exercise as it has been defined by the Supreme Court, it is entirely consistent with *Flores*.

RLPA therefore is not subject to the separation of powers objections that ultimately doomed RFRA. RFRA represented a clash between Congress and the Supreme Court over the power to interpret the Constitution. The Court held, in essence, that Congress overstepped its authority when it attempted to enforce a different conception of constitutional rights than the Court itself had adopted. Since the authority for RLPA has nothing whatever to do with interpreting the Free Exercise Clause, there is no colorable argument that it would usurp judicial authority. The Supreme Court has held that discrimination on the basis of mental disability is not subject to strict scrutiny (*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)), but that was irrelevant to Congress's authority to forbid discrimination within the reach of the Spending Power and the Commerce Power. The Court has held that age is not an impermissible basis for discrimination under the Equal Protection Clause (*Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)), but that did not detract from Congress's authority to forbid age discrimination under

the Commerce Power. This context is no different. The Court has concluded that neutral and generally applicable laws cannot violate the Free Exercise Clause, but that does not prevent Congress from protecting religious freedom under the Spending Clause and the Commerce Clause.

#### SPENDING POWER PROVISIONS

Section 2(a)(1) of the bill is an utterly routine exercise of authority under the Spending Power. There has never been any doubt about Congress's power to specify the terms under which federal money will be spent, or the way in which federally-funded projects will operate. See *United States v. Butler*, 297 U.S. 1, 73 (1936), Congress is free to fund, or not to fund, programs and activities in accordance with its view of the public interest. It necessarily follows that Congress can impose requirements and criteria on federally funded programs. It is on this basis that federal law requires public schools receiving federal financial assistance to comply with the Equal Access Act, and federally funded programs and activities to comply with over 125 different cross-cutting mandates, including the Davis-Bacon Act, the National Environmental Policy Act, Section 503 of the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964. In terms of constitutional authority, RLPA is indistinguishable from these statutes. Congress is not required to spend federal money on state and local programs that unnecessarily burden religious freedom.

It has been suggested that the Spending Power provisions of RLPA violate the strictures of *South Dakota v. Dole*, 483 U.S. 203 (1987). But the issue in *Dole* was not whether Congress could require federally funded programs to comply with federal requirements, but whether Congress could condition funds under one program—highway construction—on a State's willingness to enact legislation essentially unrelated to the highway program, namely an 18-year-old drinking age. In fact, the Court upheld even that use of the Spending Power, on the theory that lowering the drinking age is germane to the purpose of the highway spending program, which is safe interstate travel. Whatever one may think of that expansive interpretation of federal power—and I am inclined to be skeptical—it has no bearing on RLPA, which, as I have said, is a routine application of the principle that Congress may impose requirements on federally funded programs. In *Dole*, there would have been no doubt that Congress could regulate how the federally funded highways were constructed or operated. Congress could, for example, impose requirements unrelated to highway safety, such as the requirement that construction contractors hire a certain number of persons from welfare roles. The requirement that federally funded projects not unnecessarily burden the exercise of religion is similarly unexceptional. RLPA would be parallel to the actual controversy in *Dole*—and would, in my opinion, raise serious constitutional questions—if it purported to require states to comply with RLPA's substantive requirements in wholly state-funded programs as a condition to receiving federal funds for other programs. As drafted, however, this portion of RLPA raises no serious constitutional question whatsoever.

The precise reach of this provision of RLPA will depend on the circumstances of each case, but it will certainly cover many areas of importance, including virtually all public schools.

#### COMMERCE POWER PROVISIONS

Nor does Section 2(a)(2) of the bill—the Commerce Clause section—depart from the ordinary and well-established powers of Congress. It has long been recognized that Congress may regulate in the public interest—even in pursuit of noncommercial objectives—within the scope of its power to regulate commerce among the states. See *Champion v. Ames*, 188 U.S. 321 (1903) (upholding law forbidding interstate transportation of lottery tickets). RLPA does not purport to expand, contract, or define the reach of the Commerce Power; it simply provides that any religious exercise “in or affecting commerce with foreign nations, among the several States, or with the Indians tribes” is protected. It is impossible, by definition, for this portion of the bill to violate the Commerce Clause on its face. If a particular proposed application involves activity that is in, or affects, commerce, then it is covered by the bill and is also within the Commerce Power. If a particular proposed application is not in commerce, and does not affect commerce, then it would not be covered by the bill and no constitutional question would arise.

The bill is in no wise contrary to *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court's most recent pronouncement on the reach of the Commerce Power. Indeed, the very problem in *Lopez* was that the legislation at issue lacked what RLPA has—a “jurisdictional element which would ensure through case-by-case inquiry, that the [activity] in question affects interstate commerce.”

Again, the precise reach of this provision will depend on the circumstances. But among other important areas, it will cover the employment decisions of churches and religious organizations.

Some have objected that there is something unseemly about protecting religious freedom under the rubric of commerce. This strikes me as a reaction to language rather than reality. Nothing in the bill says or implies that religious exercise is merely commercial. But it is undeniable that much religious exercise, for example, the purchase of a church building, the hiring of a rabbi, or the publication of religious books, does implicate commerce. The Commerce Clause is our Constitution's means of demarcating the federal from the state spheres of regulation. There is nothing unseemly about recognizing that much religious activity falls within the protective jurisdiction of the federal government.

Some have also objected that RLPA might contribute to the expansion of federal power under the Commerce Clause. Again, this strikes me as a misunderstanding. RLPA does not purport to expand the reach of the Commerce Clause, but simply takes the Commerce Power as it is. If the Supreme Court should decide that its Commerce Clause interpretations of the past half century have been overly expansive, and hands down opinions restricting the cope of this power, this would reduce the scope of RLPA but would not affect its constitutionality. The reach of the Commerce Clause and the constitutionality of RLPA are independent questions.

#### THE ANTI-COMMANDEERING PRINCIPLE

Nor does RLPA violate the principle of *United States v. Printz*, 117 S.Ct. 2365 (1997), that, absent specific constitutional authorization, Congress may not require states to enact or enforce federal programs. This is sometimes called the "anti-commandeering" principle. RLPA does not do that. Rather, RLPA forbids states and local governments from taking certain actions. This is a form of preemption, not of commandeering.

#### LAND USE

Section 3(b) of the bill warrants particular attention. This section applies to land use regulation. It will be constitutional as applied to situations within the reach of the Spending Power, the Commerce Power, or Section Five of the Fourteenth Amendment. Presumably, there may be specific instances of land use regulation that do not involve federally funded programs, are so entirely intrastate as not to trigger the Commerce Clause, and would not violate the Free Exercise Clause; the bill could not constitutionally be applied to such instances. But most potential applications will presumably fall within one of these sources of federal authority. Because most land use decisions are made on an individuated basis, with the potential for discriminatory application, most such cases should be covered under Section Five. It also seems probable that most instances of land use will affect commerce and thus have a second and independent jurisdictional hook under the Commerce Clause.

There is no basis for the suggestion that land use is exclusively a matter of state regulation and cannot be regulated by Congress even if it falls within an enumerated power. The notion that land use is, by definition, outside the Commerce Power was rejected in *Hodel v. Surface Mining Association*, 452 U.S. 264 (1981). If critics of the bill on this ground were correct, then the Fair Housing Act could not apply to local zoning decisions. Obviously, that is not true.

#### ESTABLISHMENT CLAUSE

The only other argument that RLPA is unconstitutional is based on the Establishment Clause. Here, the argument is that RLPA unconstitutionally favors religion because it protects religious freedom without extending comparable protection to nonreligious commitments or institutions. This argument, though long popular among some academics and advocacy groups, is directly contradicted by the text and history of the First Amendment, has no support in the traditions of this country, and has been squarely rejected by the Supreme Court. Indeed, when Justice Stevens put forth this theory in his concurring opinion in *Flores*, no other Justice could be persuaded to join.

The notion that religion-specific accommodations are unconstitutional is contradicted by the very text of the First Amendment. The First Amendment, after all, protects the free exercise of religion, and does not extend comparable protection to nonreligious commitments, institutions, or acts of conscience. The precise scope of this protection has been contested over the years, but one thing is certain: it cannot be true that the First Amendment forbids singling out religious exercise for special protection, or the First amendment would violate the First Amendment. It should

be noted, also, that religion is similarly singled out by the Establishment Clause. Under the Establishment Clause, government is forbidden to actively promote religion, in the way that it can actively promote other commitments and institutions. The suggestion that it is somehow "unfair" to secular ideologies to protect religious claims of conscience but not to protect comparable secular claims rings hollow when we consider that secular ideologies are free to compete for government assistance and approval, while religion is not.

Moreover, this wording of the First Amendment is not accidental. Several early drafts of what would become the First Amendment used the term "conscience" instead of the term "religion," which might imply that religious and nonreligious forms of conscientious belief and practice should be equally protected. But the framers deliberately adopted the narrower term. This history is recounted, with citations to the historical record, in my article, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

The idea of religion-specific accommodations was familiar to the framers. It was not uncommon for colonies, and later states, to exempt various persons from military service, oath requirements, tithing requirements, and other burdens on grounds of conflict with religious conviction. To my knowledge, there was never any claim that this amounted to an improper preference or establishment. To be sure, there was considerable disagreement then (as now) over whether an overarching legal or constitutional right to religious accommodation should be recognized, but those who opposed such a right invariably maintained that accommodation should be left to the discretion of the legislature. Again, for detail and citations to the historical record, I refer the Committee to my work cited in the previous paragraph.

This is the position of the Supreme Court today. In *Employment Division v. Smith*, a minority of the Court believed that religious accommodation is constitutionally mandated, and a majority of the Court believed that it is not; but even the majority declared that accommodation should be left to "the political process." 494 U.S. at 890. No Justice suggested that religious accommodation is improper or unconstitutional. Similarly, in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Court unanimously rejected the claim that it is unconstitutional to exempt religious organizations from laws that apply to all other groups. The Court stated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. Where "the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Id.* at 338.

To be sure, under some circumstances it is unconstitutional to single out religion, or religious institutions, for favorable treatment. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Key to the analysis in *Texas Monthly*, however, is the proposition that, to satisfy the Establishment Clause, a religion-specific accommodation must be "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Id.* at 18 n.8; see also *id.* at 15 (stating that the test is whether the challenged action can "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). This requirement is essentially identical to RLPA's "substantial burden" test. In addition to this requirement, the Establishment Clause also may be violated if the accommodation imposes a disproportionate burden on nonbeneficiaries or if it is too narrowly confined to a single faith, without reasonable secular justification. (For further explanation of modern accommodation doctrine, with citation to the precedents, I refer the Committee to my articles, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, and *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992).) In light of RLPA's generality, it certainly cannot be faulted for being too narrowly confined to a particular religion, and the burden on nonbeneficiaries would be a factor to consider under the government's compelling interest.

Some have suggested that, although individual religion-specific accommodations may generally be permissible, it is unconstitutional for Congress or the states to enact general accommodation laws that apply across the board. It is hard to imagine what the basis for this claim could be. Most civil rights statutes are general, and apply across the board. If anything, one would think that a general accommodation statute is less likely to generate Establishment Clause problems precisely because of its generality. Moreover, if this argument had any validity, it would suggest that state constitutional provisions that have been interpreted as imposing a compelling interest test would be unconstitutional, since states are subject to the same Establishment Clause limits as the federal government. That borders on the preposterous.

Others have suggested that, although some form of heightened scrutiny for burdens on religious exercise would be constitutional under the Establishment Clause, the compelling interest test goes too far. Whatever this may be, it is not a logical argument under the Establishment Clause. The underlying claim is that special protection for religion, if not coupled with comparable protection for secular commitments and institutions, is an unconstitutional "preference" for religion. If that is true, then it does not matter whether the special protection is in the form of a compelling interest test or some lesser degree of protection. A small preference is no less unconstitutional than a big one. Once we recognize that this argument would produce the result that no special accommodation of religion is constitutionally required, it becomes evident why it has been so uniformly rejected by the courts. It would mean, for example, that Congress cannot allow Jewish soldiers to wear yarmulkes unless it is willing to allow all manner of hatwear; that public universities cannot excuse students from examinations on holy days without excusing them for conflicting family or professional obligations; that Native Americans may not be allowed to be permitted to use peyote in their ceremonies unless we are willing to allow the drug to be used by everyone else. The freedom of religion could survive without RLPA, but it could not survive an interpretation of the Establishment Clause that made religious accommodations unconstitutional.

Even if there were something problematical about using the compelling interest test, the problem is more theoretical than real. Frankly, the "compelling interest" test of RFRA, like the "compelling interest test" of pre-*Smith* constitutional law, has been interpreted less rigorously than the words suggest. The compelling interest test, in practice, has been little more than intermediate scrutiny: the requirement that government action be narrowly tailored to serve an important governmental purpose. I am not sure that is all bad. Because freedom of religion includes "exercise"—meaning conduct—it is more likely to come into conflict with the legitimate needs of government than rights such as freedom of speech. Indeed, I think it would make little practical difference if the sponsors of the bill substituted intermediate for strict scrutiny, and this might be a more accurate terminology. It is not, however, required by the Establishment Clause.

What matters most is that some form of heightened scrutiny be available to give religious believers a legal basis for negotiating reasonable accommodations when government policies threaten their religious practices. Without RLPA, state and local governmental bodies can run roughshod over religious freedom without the need to consider whether there might be reasonable accommodations that would achieve most or all of the governmental interest without imposing a severe burden on religious exercise. With RLPA, governmental bodies will know that they have a legal obligation to consider the impact on religious freedom, and to make accommodations where possible. In most cases, this will result in mutually satisfactory arrangements without need for litigation. In some cases, the parties will end up in court. There is no guarantee that courts will decide such cases wisely or well. That is a cost. But the alternative—to leave religious exercise at the mercy of state and local policy in the absence of overt discrimination or persecution—would be faithless to this nation's tradition of religious freedom.

As George Washington stated, in connection with the Quakers' need for exemption from military service: "in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

The CHAIRMAN. Thank you. This has been very stimulating and very fascinating to me and I do have a few questions. Let me just ask a simple one right off the bat, and that is I would like each of you to tell me in just a sentence or two what you think the *City of Boerne* case actually means.

Professor Laycock.

Mr. LAYCOCK. *City of Boerne* holds—

The CHAIRMAN. I would also like you to add to that why this bill does or does not comply with it.

Mr. LAYCOCK. *City of Boerne* is a case about congressional power to enforce the 14th Amendment and it says that under that power, Congress must act on the Court's understanding of the constitutional right to be enforced and whatever it does is to be proportionate to that understanding.

This bill complies because with respect to section 3, we have made the record that there are widespread violations of the Court's understanding of free exercise in the land use context, and with respect to the Commerce and Spending Clause provisions because *Boerne* simply does not apply to them. Those powers do not depend upon identifying anyone's understanding of a constitutional violation before Congress acts. They depend upon Congress' finding that commerce is affected or that Federal spending is at issue.

The CHAIRMAN. Professor Hamilton.

Ms. HAMILTON. The *City of Boerne* decision is, in my view, a very large decision. What it says is that Congress must treat the Supreme Court's interpretation of the Constitution, including the First Amendment, with respect; and, second, that the Court reaffirmed its allegiance to *Marbury v. Madison*, in which they said that the Court has the last word on the interpretation of the Constitution. So I read the case as being a case saying that RFRA violated the separation of powers and violated the federalism limitations on the Federal Government.

The CHAIRMAN. Professor Eisgruber.

Mr. EISGRUBER. I think I am closer to Professor Laycock on this particular point than to Professor Hamilton; that is, I agree with him that the *City of Boerne* decision was a case about congressional power to enforce the 14th Amendment. I agree with him that the holding of the Court was that any effort under that clause must involve a means proportionate to the Court's understanding of the legitimate constitutional goal. And I agree with him that it doesn't say anything about the commerce or spending power issues in this statute. I think those are governed by other precedents.

I don't agree with him about the application of that rule to the sections dealing with land use regulation in this bill, and here I would repair to something Professor Hamilton said in her earlier remarks. I think what Congress has to do is not only identify a record of violations, but then implement a test that is proportionate to and congruent to those violations. I don't think that is being done here.

The CHAIRMAN. Professor McConnell.

Mr. MCCONNELL. Well, I largely agree with Professor Eisgruber, except with respect to land use I think that it is quite possible—although I don't expect it, it is quite possible that some conceivable application of the land use provision of this bill could be beyond Congress' power, but I don't think that the courts are going to be able to strike it down on its face.

There may be specific applications that come down the road, but a very large number of land use cases involve standardless discretion, not generally applicable laws. Certainly, section 5 is going to apply to that. I don't think that Chris would disagree with that. And then there is going to be a certain—many of those cases are in or affecting commerce. The sale of land, the construction of buildings, and so forth, are certainly in and affecting commerce. Those cases are certainly going to be within that.

Now, if there is some case that falls outside of one of those two categories, then, you know, maybe there is going to be a hard case. But I even find it a little bit difficult to imagine what that case is,

and certainly the statute is not unconstitutional on its face under that.

The CHAIRMAN. Professor Hamilton, you suggest that S. 2148, this bill, violates the separation of powers, article V's ratification procedures, and the enumerated powers requirement, and you cite *Boerne* and *Marbury v. Madison* for all these conclusions. Could you explain your objections here? And then I would appreciate it if each of you, starting with you, Professor Laycock, would give your comments as well.

Ms. HAMILTON. The bill is, in fact, obviously an attempt to turn RFRA into something that will work and it uses the compelling interest and least restrictive means test. So on its face, the bill is the same as RFRA. The only difference is that it now says that that standard, instead of, like RFRA, applying to every single law imaginable in the United States, it applies to every dollar of Federal spending and every activity in interstate commerce.

To that extent, that vast range of cases, it is an attempt to read-just the relationship between church and state in opposition to where the Court has said the Constitution places that relationship. So, in my view, it violates the separation of powers. It is an attempt to end-run the very plain language in the *Boerne* case saying that the Court has the final say on the interpretation of the Free Exercise Clause.

I thought it was extremely apt that Professor McConnell started out by saying that we would have disagreements on the meaning of the Free Exercise Clause. That is what this debate is about. We are debating whether or not the Constitution ought to be amended. That is the substance of this debate. That it is attempting to be packaged as a Commerce Clause power or a spending power doesn't stop the fact that that is what the debate is about.

Let me add just finally that what is truly bizarre in these proceedings is if you go back to the history of the framing of the Constitution, if you read the notes on the debates at the framing of the Constitution, what did the Framers discuss when they discussed religion? They discussed one thing. They were fearful that religion has the capacity to overstep its bounds, that religion in Europe had inappropriately overstepped its bounds.

They assumed that Congress would have no authority over the subject of religion of any kind, and therefore they did not need a bill of rights. The Bill of Rights would have been superfluous. So what is truly bizarre is that now what this bill does, as RFRA did, is it attempts to turn the First Amendment, the subject of the First Amendment, into an enumerated power, and that, I think, violates the Framers' intent and it certainly violates what the *Boerne* Court had to say.

The CHAIRMAN. Well, if I interpret you correctly, then, you are saying the constitutionality of laws depends not on the powers of Congress, but on the motivation of Congress. Can you cite any case law to support that proposition?

Ms. HAMILTON. It is not the motivation of Congress. Of course, that is irrelevant. The Supreme Court has made that clear. It is the purpose of the law that is used to understand what the law means, and the Court has said that purpose is, in fact, an indication of the meaning of the law and that is what I am saying here.

The purpose of this law is to trump the Supreme Court's *Smith* decision in as many circumstances as could be conceived.

The CHAIRMAN. Professor Laycock.

Mr. LAYCOCK. I think I disagree with every sentence and phrase of what Professor Hamilton just said.

The CHAIRMAN. This is shocking. [Laughter.]

Mr. LAYCOCK. It is possible that the Supreme Court, or five of them, share her anger about this process, and they will distort any doctrine, ignore any precedent, say absolutely anything to strike this law down. It is possible. I don't think the Supreme Court behaves that way. I disagree with them. I have criticized them, but I think they, by their lights, make principled decisions, and they would have to change an awful lot of things to strike this down.

With respect to the founding, the Framers were also very fearful of government regulation of religion, and the lessons of the conflict in Europe are precisely that it was government that had the power to suppress religion and send people to jail and burn them at the stake, and it was government that used that power.

The argument that a bill of rights was not needed because Congress had—the enumerated powers could never intersect with things like speech and religion—that argument was rejected at the very beginning. The Bill of Rights was added in the First Congress. The commerce power in 1789 didn't reach much religion because there wasn't much interstate commerce, but that has changed. The facts have changed. There is an enormous degree of interstate commerce now.

There is a disagreement about the meaning of free exercise that operates here. What *Boerne* says is when we are directly interpreting the Constitution—and in the Court's view, that included congressional efforts to enforce the Constitution under section 5 of the 14th Amendment—we must operate on the Court's understanding of the Constitution.

But the Court in *Boerne* also said when Congress acts within the scope of its own powers, it has the right and the duty to make its own judgment about the proper meaning of the Constitution. And the Commerce Clause and the Spending Clause are precisely Congress acting within the scope of its own powers. On perfectly standard economic models, if you substantially burden an activity, you will reduce the volume of that activity. You substantially burden religious exercise; there will be less religious exercise and less commerce generated by exercise. Now, the concern about the dollar effect is not what motivates Congress, but it is a perfectly legitimate use of the commerce power.

Finally, all of this connects to Professor Hamilton's earlier point that Congress can exempt religious practices from burdensome regulation one practice at a time and they can have narrow-scope retail exemptions, but they cannot have a general standard for exemptions. The generality of this law drives most of her arguments. Because it is so general, it is a disguised amendment to the First Amendment and a disguised overruling of the Supreme Court. Because it is so general, it is an establishment. Because it is so general, it is unworkable.

There are very sound reasons why this bill is so general. They are elaborated at length in the deliberations on RFRA. Unless Con-

gress proceeds by general standard, it will inevitably discriminate between religions that are large enough or organized enough or have had the ear of some Congressman and can get a bill through and all those religions that can't, that are too small, too disorganized, too unpopular, too unattractive in the press, don't make a good sound bite.

All of the individual religious practices aren't part of an organized denomination that could ever imaginably come here and steer a bill through this process. Retail, specific exemptions discriminate. They discriminate between religions and among religions, and not only is that bad policy, it is also much more likely to be unconstitutional. That is the lesson of the Supreme Court's Establishment Clause cases.

The exemptions that they have struck down under the Establishment Clause have been struck down because they were too narrow. In the *Kiryas Joel* case, the Court said here is an exemption for one sect in one community. That is too narrow. We don't know that you would do that for everybody. In *Thornton v. Caldor*, Justice O'Connor said an exemption just for people who observe the Sabbath is too narrow. The title VII exemption for any religious practice that shows up in a place of employment is much better because that is even-handed, that is neutral, that applies to everybody.

The scope of this law is not a constitutional defect; it is a constitutional strength, and it is also a policy strength.

The CHAIRMAN. Well, I want to get to you, Professor Eisgruber, and to you, Professor McConnell, but as a general matter Congress may preempt State law under the Commerce Clause either to implement its own commercial regulation or to deregulate commercial activity. Illustrations would be what Congress has done with regard to airline rates or railroad and trucking industry operations.

If religious broadcasters are subject to the humane regulations of the FCC, religious groups subject to kosher food processing through the Humane Slaughter Act, if that is subject to FDA, which it is, FDA's supervision, all under the Commerce Clause, why then cannot Congress alleviate burdens on religious activities which have similar effects on commerce under the Commerce Clause as we do in this bill?

Go ahead, Professor Eisgruber.

Mr. EISGRUBER. I am sorry, Senator. Would you like me to respond on that particular point or—

The CHAIRMAN. You can go back to the original, but I am just surmising.

Mr. EISGRUBER. I would certainly agree with you on that last point briefly that Congress can remove particular burdens upon religious liberty. And indeed, unlike Professor Hamilton, I also think that Congress can legislate broadly in this area. I think it could certainly do so by using the reasonable accommodation standard. It might be able to do so using the intermediate scrutiny standard, although there is language from Justice Kennedy in *Flores* suggesting that standard is poorly tailored as well. But I don't think there is an absence of power in Congress to redress these problems either in a specific way or in a general way.

Let me go back to the original question which was about *Marbury* and the separation of powers, as I recall. I personally do

not find *Marbury v. Madison* very helpful to the issues here. The Supreme Court did discuss it in the *Boerne* opinion. It somehow suggested that if it had ruled the other way in *Boerne* that *Marbury* would be imperiled by that. I am not persuaded at all by that argument.

It seems to me that even if the Supreme Court said that Congress had power to go beyond liberties, as it understood them, but that if the Court had the final word as to whether or not Congress had that power, *Marbury* would still be in position. So although I agree with the Court's decision in *Boerne*, I don't agree that *Marbury* helps very much.

I do, however, think that there are three separation of powers concerns here that are worth attending to. I have framed these in my testimony and in some of my academic writing in constitutional terms. I think that they are even stronger in policy terms. Let me put them that way.

The first of these is that RLPA, like RFRA before it, is rather unusual, I think, in taking a standard from the judiciary, the compelling State interest test, which the judiciary had abandoned on the ground that it couldn't make sense of it in this context, and putting it back into the judiciary's hands on the ground that the courts ought to work this out and that it has been a workable standard in the past.

It seems to me here that the judiciary's hands are being tied in a way that is possibly unconstitutional, but certainly not a desirable way, I think, in which to provide legislative standards for the Court. And I stress in connection with that argument one of the things that Justice Scalia said, and this is consistent with something that Professor McConnell pointed out in his testimony. Justice Scalia said the compelling State interest standard in this line of cases doesn't seem to mean the rather clear thing that it has meant everywhere else. Indeed, our line of cases, Justice Scalia said, is not very well explained by this particular standard. It is unworkable here.

And it seems to me giving the judiciary a standard that they have declared unworkable and declaring only that it has been adopted into this legislation because it was workable in the judiciary in the past is not a good way for Congress and the Court to cooperate.

The second observation is just a point about institutional diplomacy. I agree with Professor Laycock that the Court ought not to be reacting to statutes on the basis of whether or not it thinks Congress is fighting with it or disagreeing with it. I would hope that the Court doesn't do that. I agree with him. I don't think they generally do do that.

But it does seem to me that this particular statute, which follows on two Supreme Court's decisions, looks like an effort to reverse them, and looks like an effort to reverse them by pressing the *Lopez* decision and the *Dole* decision to the limits of their logic. And perhaps saying I think we can do this, despite the spirit of your past decisions, strikes me as imprudent if one wants to protect religious liberty, which is I think one reason, again, for departing from this standard.

The third point is that I think that there is an opportunity here for collaboration on the goals of religious liberty on which the Court and Congress might agree. I agree with Professor McConnell. There are two clauses in the First Amendment of the Constitution pertaining to religion. I agree they are both important and I don't want to make an argument, as he suggests, that suggests that the First Amendment is somehow unconstitutional under itself.

I think those two clauses point to two different kinds of problems about which the Court has been concerned and about which Congress ought to be concerned. One problem is the problem that results when laws burden religious conduct and impede free exercise. Another problem is the problem that results when religion is given special advantages or privileges. It seems to me that a better model of collaboration would take into account both of those interests in a way that the compelling State interest test does not do.

The CHAIRMAN. Now, we have got a vote on and my questions have gone a little longer than they should have. Senator DeWine has one question he would like to ask.

You have a number you want to ask, right, Senator?

Senator DURBIN. Two.

The CHAIRMAN. OK. Well, why don't you finish, Professor McConnell, and then we will turn to Senator Durbin; he has two questions. And then we will turn to Senator DeWine.

Mr. MCCONNELL. In light of time, I agree quite substantially with Professor Laycock. I would be happy to move on.

The CHAIRMAN. All right, thanks.

Let's turn to Senator Durbin.

Senator DURBIN. Thank you very much. Professor McConnell, I was sitting in the other room and I overheard most of your testimony. The analogy to free speech, as I said at the outset, is interesting in this committee because we are today trying to protect the freedom of religion in the First Amendment to the Constitution, and tomorrow we will try to restrict freedom of speech.

But having said that, let me try to go beyond the parade of horrors which tends to offend Professor Laycock and others, and which Justice Scalia talked about, and get down to two specific examples, and some of them have been given to me in a publication from the Baptist Joint Committee.

You have a religion that says the filing fee of \$1,000 to get a conditional use permit for the construction of their building is something they can't afford and would inhibit their free religious practice by taking resources away from them and they object to it. They object to it on religious grounds. Does this statute that we are talking about here in any way protect their right to assert the need not to file that fee?

Mr. MCCONNELL. Senator, I don't think so. At least, you know, if a church came to me and said, would you take that case on a contingency fee basis, I would say, you know, find someone else. I think that where there are routine, purely financial obligations that religious organizations to exactly the same extent that they would affect anyone else, to say that that—it might be a burden on the exercise of religion in some technical sense. But if the term "substantial" means anything, it means that that kind of claim would be cut off.

Senator DURBIN. A second example. I want to build a bowling alley and the ordinance requires me to have a parking lot so that there isn't some burden on on-street parking and traffic. And a church wants to build in the same place and says we can't afford a parking lot, but we want to put our church there. Under this statute, is that church going to be treated any different than the bowling alley?

Mr. MCCONNELL. Senator, I think it might very well. Let's imagine that next door to the bowling alley is a shopping center where most of the stores are closed on Sunday and where the owner of the shopping center is perfectly willing to let worshippers park there. I have been to a church under circumstances—

Senator DURBIN. That is an easy way out. I won't let you have that.

Mr. MCCONNELL. But let me continue. If the bowling alley is next door, it doesn't matter how silly or irrational; the rule or rules apply to bowling alleys. They may be able to get a political remedy, but they don't have any leg to stand on. The church will be able to go in and be able to show that at least under these circumstances, that parking lot requirement doesn't serve any important governmental interest and they ought to win the case.

Senator DURBIN. Professor Hamilton, what do you think about those two examples?

Ms. HAMILTON. Well, I think it is hard to predict because we have not used the least restrictive means requirement with respect to these kinds of general laws. So what is the least restrictive means when a church wants to avoid the parking requirement? I imagine it is letting them park on the street, or it is permitting them to have land, you know, that is three blocks down that is in a residential section where they weren't supposed to go at all.

I mean, least restrictive means, means if it is enforced by the courts—it can be watered down, but if it were enforced by the courts, it means you have to tailor the law to the particular religious claimant.

Senator DURBIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Mr. LAYCOCK. Senator, could I very briefly say two things about that?

The CHAIRMAN. Yes.

Mr. LAYCOCK. One, much of Professor Hamilton's argument is dependent upon the claim that before *Smith* the courts dramatically under-enforced these rights, but if you enact this bill, they are going to dramatically over-enforce these rights and we will get all sorts of crazy results. I don't think judicial behavior is going to change and I think the risk of under-enforcement is very much greater.

Second, it is true the Court said in *Boerne* that the least restrictive means test did not apply, and it is true that the Court can change the law. But the Court cannot rewrite history, and its own precedents unambiguously in those very words say—Justice Burger, in 1981, for example—that the least restrictive means test was the test.

The CHAIRMAN. Thank you.

Senator DeWine.

**STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM  
THE STATE OF OHIO**

Senator DEWINE. Thank you, Mr. Chairman. We have about 7 minutes until the roll call ends, if each of you could be brief in your answer to the following question, I would appreciate it. I would invite you to submit anything in writing in response to that question if you would like to do so.

My question concerns this bill's effect on the law in regard to the medical treatment of children versus religious convictions and religious rights. Professor Hamilton has addressed this briefly in regard to immunizations. I would like each one of you to address this issue. Would this bill impact or change in any way that tug and pull that we have seen over the last few decades?

Mr. LAYCOCK. No. Health care for children is a compelling interest, and even if I didn't think that, the courts always think that.

Ms. HAMILTON. Once again, the question is what is the least restrictive means in this particular scenario. The least restrictive means, according to the Christian Scientists, in certain cases is to let the child continue to be ill to a particular point. The question is at what point do you have to take that child to the hospital, and I think the least restrictive means pushes the margin back against the interests of the child.

Mr. EISGRUBER. I don't know what the courts would do under this standard in those cases.

Mr. MCCONNELL. I think it might very well change matters. A number of parents have been prosecuted for manslaughter where their children have died under Christian Science care, and the Christian Scientists have taken the following position which seems to me quite reasonable. They have asked that the laws requiring notification of medical authorities be applied to them, so that they would inform medical authorities of the situation so the State would be able to step in to provide medical care, if that is the State's judgment to do so.

But don't prosecute the parents for murder when they are providing for their children the very same care that they would provide to themselves and when they believe that this is the very best possible way to cure their children. Now, this is a least restrictive means approach because it would enable the State to protect the children, but would not put the parents in the position of not only violating their religion, but also of providing something which, in their judgment, is not the best way of healing their children. I don't know whether the courts would accept that or not, but it seems to me a perfectly reasonable position.

Senator DEWINE. Well, I thank you all for your answers and I would invite any of you that want to supplement that with any additional comments to please submit that for the record, and I will guarantee you this Senator will take a look at it.

Thank you very much.

The CHAIRMAN. Well, I want to thank each of you for being here. It has been a particularly stimulating panel and I think you have all brought a certain amount of enlightenment to the committee.

We will keep the record open until tomorrow evening for anybody on the committee to submit additional questions. Since we rely rather heavily on what you people say, I would appreciate it if you

would answer those questions as definitely as you can and as quickly as you can because we intend to mark up this bill probably within the next week or so. So we would really appreciate that, and I want to thank each of you for your enlightened testimony. We are trying to do what is right. We are trying to do the best we can here. And I have to say you have been very helpful to us today, so thank you very much.

With that, we will adjourn until further notice.

[Whereupon, at 12:42 p.m., the committee was adjourned.]

## APPENDIX

PROPOSED LEGISLATION

II

105TH CONGRESS  
2D SESSION**S. 2148**

To protect religious liberty.

IN THE SENATE OF THE UNITED STATES

JUNE 9, 1998

Mr. HATCH (for himself and Mr. KENNEDY) introduced the following bill;  
which was read twice and referred to the Committee on the Judiciary

**A BILL**

To protect religious liberty.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Religious Liberty Pro-  
5 tection Act of 1998”.

6 **SEC. 2. PROTECTION OF RELIGIOUS EXERCISE.**

7 (a) GENERAL RULE.—Except as provided in sub-  
8 section (b), a government shall not substantially burden  
9 a person’s religious exercise—

10 (1) in a program or activity, operated by a gov-  
11 ernment, that receives Federal financial assistance;  
12 or

1           (2) in or affecting commerce with foreign na-  
2       tions, among the several States, or with the Indian  
3       tribes;  
4 even if the burden results from a rule of general applicabil-  
5 ity.

6       (b) EXCEPTION.—A government may substantially  
7 burden a person's religious exercise if the government  
8 demonstrates that application of the burden to the per-  
9 son—

10           (1) is in furtherance of a compelling govern-  
11       mental interest; and

12           (2) is the least restrictive means of furthering  
13       that compelling governmental interest.

14       (c) FUNDING NOT AFFECTED.—Nothing in this sec-  
15 tion shall be construed to authorize the United States to  
16 deny or withhold Federal financial assistance as a remedy  
17 for a violation of this Act.

18       (d) STATE POLICY NOT COMMANDEERED.—A gov-  
19 ernment may eliminate the substantial burden on religious  
20 exercise by changing the policy that results in the burden,  
21 by retaining the policy and exempting the religious exer-  
22 cise from that policy, or by any other means that elimi-  
23 nates the burden.

24       (e) DEFINITIONS.—As used in this section—

1 (1) the term “government” means a branch, de-  
2 partment, agency, instrumentality, subdivision, or  
3 official of a State (or other person acting under  
4 color of State law);

5 (2) the term “program or activity” means a  
6 program or activity as defined in paragraph (1) or  
7 (2) of section 606 of the Civil Rights Act of 1964  
8 (42 U.S.C. 2000d–4a); and

9 (3) the term “demonstrates” means meets the  
10 burdens of going forward with the evidence and of  
11 persuasion.

12 **SEC. 3. ENFORCEMENT OF THE FREE EXERCISE CLAUSE.**

13 (a) **PROCEDURE.**—If a claimant produces prima facie  
14 evidence to support a claim of a violation of the Free Exer-  
15 cise Clause, the government shall bear the burden of per-  
16 suasion on all issues relating to the claim, except any issue  
17 as to the existence of the burden on religious exercise.

18 (b) **LAND USE REGULATION.**—

19 (1) **LIMITATION ON LAND USE REGULATION.**—  
20 No government shall impose a land use regulation  
21 that—

22 (A) substantially burdens religious exer-  
23 cise, unless the burden is the least restrictive  
24 means to prevent substantial and tangible harm

1 to neighboring properties or to the public health  
2 or safety;

3 (B) denies religious assemblies a reason-  
4 able location in the jurisdiction; or

5 (C) excludes religious assemblies from  
6 areas in which nonreligious assemblies are per-  
7 mitted.

8 (2) FULL FAITH AND CREDIT.—Adjudication of  
9 a claim of a violation of this subsection in a non-  
10 Federal forum shall be entitled to full faith and  
11 credit in a Federal court only if the claimant had a  
12 full and fair adjudication of that claim in the non-  
13 Federal forum.

14 (3) NONPREEMPTION.—Nothing in this sub-  
15 section shall preempt State law that is equally or  
16 more protective of religious exercise.

17 (4) NONAPPLICATION OF OTHER PORTIONS OF  
18 THIS ACT.—Section 2 does not apply to land use  
19 regulation.

20 **SEC. 4. JUDICIAL RELIEF.**

21 (a) CAUSE OF ACTION.—A person may assert a viola-  
22 tion of this Act as a claim or defense in a judicial proceed-  
23 ing and obtain appropriate relief against a government.  
24 Standing to assert a claim or defense under this section

1 shall be governed by the general rules of standing under  
2 article III of the Constitution.

3 (b) ATTORNEYS' FEES.—Section 722(b) of the Re-  
4 vised Statutes (42 U.S.C. 1988(b)) is amended—

5 (1) by inserting “the Religious Liberty Protec-  
6 tion Act of 1998,” after “Religious Freedom Res-  
7 toration Act of 1993,”; and

8 (2) by striking the comma that follows a  
9 comma.

10 (c) PRISONERS.—Any litigation under this Act in  
11 which the claimant is a prisoner shall be subject to the  
12 Prison Litigation Reform Act of 1995 (including provi-  
13 sions of law amended by that Act).

14 (d) LIABILITY OF GOVERNMENTS.—

15 (1) LIABILITY OF STATES.—A State shall not  
16 be immune under the 11th amendment to the Con-  
17 stitution from a civil action, for a violation of the  
18 Free Exercise Clause under section 3, including a  
19 civil action for money damages.

20 (2) LIABILITY OF THE UNITED STATES.—The  
21 United States shall not be immune from any civil ac-  
22 tion, for a violation of the Free Exercise Clause  
23 under section 3, including a civil action for money  
24 damages.

1 **SEC. 5. RULES OF CONSTRUCTION.**

2 (a) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in  
3 this Act shall be construed to authorize any government  
4 to burden any religious belief.

5 (b) **RELIGIOUS EXERCISE NOT REGULATED.**—Noth-  
6 ing in this Act shall create any basis for regulation of reli-  
7 gious exercise or for claims against a religious organiza-  
8 tion, including any religiously affiliated school or univer-  
9 sity, not acting under color of law.

10 (c) **CLAIMS TO FUNDING UNAFFECTED.**—Nothing in  
11 this Act shall create or preclude a right of any religious  
12 organization to receive funding or other assistance from  
13 a government, or of any person to receive government  
14 funding for a religious activity, but this Act may require  
15 government to incur expenses in its own operations to  
16 avoid imposing a burden or a substantial burden on reli-  
17 gious exercise.

18 (d) **OTHER AUTHORITY TO IMPOSE CONDITIONS ON**  
19 **FUNDING UNAFFECTED.**—Nothing in this Act shall—

20 (1) authorize a government to regulate or af-  
21 fect, directly or indirectly, the activities or policies of  
22 a person other than a government as a condition of  
23 receiving funding or other assistance; or

24 (2) restrict any authority that may exist under  
25 other law to so regulate or affect, except as provided  
26 in this Act.

1 (e) **EFFECT ON OTHER LAW.**—Proof that a religious  
2 exercise affects commerce for the purposes of this Act does  
3 not give rise to any inference or presumption that the reli-  
4 gious exercise is subject to any other law regulating com-  
5 merce.

6 (f) **SEVERABILITY.**—If any provision of this Act or  
7 of an amendment made by this Act, or any application  
8 of such provision to any person or circumstance, is held  
9 to be unconstitutional, the remainder of this Act, the  
10 amendments made by this Act, and the application of the  
11 provision to any other person or circumstance shall not  
12 be affected.

13 **SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.**

14 Nothing in this Act shall be construed to affect, inter-  
15 pret, or in any way address that portion of the first  
16 amendment to the Constitution prohibiting laws respect-  
17 ing an establishment of religion (referred to in this section  
18 as the “Establishment Clause”). Granting government  
19 funding, benefits, or exemptions, to the extent permissible  
20 under the Establishment Clause, shall not constitute a vio-  
21 lation of this Act. As used in this section, the term “grant-  
22 ing”, used with respect to government funding, benefits,  
23 or exemptions, does not include the denial of government  
24 funding, benefits, or exemptions.

1 **SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORA-**  
2 **TION ACT.**

3 (a) **DEFINITIONS.**—Section 5 of the Religious Free-  
4 dom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is  
5 amended—

6 (1) in paragraph (1), by striking “a State, or  
7 subdivision of a State” and inserting “a covered en-  
8 tity or a subdivision of such an entity”;

9 (2) in paragraph (2), by striking “term” and all  
10 that follows through “includes” and inserting “term  
11 ‘covered entity’ means”; and

12 (3) in paragraph (4), by striking all after  
13 “means,” and inserting “an act or refusal to act  
14 that is substantially motivated by a religious belief,  
15 whether or not the act or refusal is compulsory or  
16 central to a larger system of religious belief.”.

17 (b) **CONFORMING AMENDMENT.**—Section 6(a) of the  
18 Religious Freedom Restoration Act of 1993 (42 U.S.C.  
19 2000bb–3(a)) is amended by striking “and State”.

20 **SEC. 8. DEFINITIONS.**

21 As used in this Act—

22 (1) the term “religious exercise” means an act  
23 or refusal to act that is substantially motivated by  
24 a religious belief, whether or not the act or refusal  
25 is compulsory or central to a larger system of reli-  
26 gious belief;

1           (2) the term "Free Exercise Clause" means  
2           that portion of the first amendment to the Constitu-  
3           tion that proscribes laws prohibiting the free exercise  
4           of religion and includes the application of that pro-  
5           scription under the 14th amendment to the Con-  
6           stitution; and

7           (3) except as otherwise provided in this Act, the  
8           term "government" means a branch, department,  
9           agency, instrumentality, subdivision, or official of a  
10          State, or other person acting under color of State  
11          law, or a branch, department, agency, instrumentality,  
12          subdivision, or official of the United States, or  
13          other person acting under color of Federal law.

## QUESTIONS AND ANSWERS

**RESPONSE OF ELDER DALLIN H. OAKS  
TO INQUIRY FROM SENATOR ORRIN G. HATCH  
SENATE JUDICIARY COMMITTEE**

The Committee has asked that I respond to the following questions:

Many commentators on RFRA focus solely on the reported cases in judging its effectiveness. Could you explain how important RFRA was in negotiating accommodations outside of litigation, and how important the enactment of the RLPA will be to you in similarly resolving disputes outside of court?

Please, to the extent you can, supplement your oral answers from the hearing with further examples for the written record.

I am pleased to respond, and to further supplement the record concerning the importance of a congressional statute protecting religious freedom.

Since the United States Supreme Court's decision in *Employment Division v. Smith* in 1990, The Church of Jesus Christ of Latter-day Saints ("the Church") has been involved in numerous and varied discussions and negotiations concerning what we perceive to be governmental infringement upon religious practice. Invariably, as part of these negotiations and discussions, representatives of state and local governments have pointed to the new standard established by *Smith*, arguing that the particular infringing law or regulation is "generally applicable" and "neutral", and therefore that government need not justify the law's existence under a strict scrutiny standard. As a Church, we have faced this argument — both in formal litigation situations and in pre-litigation negotiations — literally dozens of times.

During the time that RFRA was in full force and effect, we were able to provide a strong response to these arguments. Essentially, while First Amendment constitutional

jurisprudence no longer requires government to defend “generally applicable” and “neutral” laws or regulations under the strict scrutiny standard in RFRA, Congress and the President had chosen to protect these important religious rights by statute, imposing strict scrutiny review on all government action that infringes on religious practice, whether or not that action is “generally applicable” or “neutral”.

The cases in which the Church was successful in utilizing RFRA’s protections in non-litigation areas can be classified into three main categories: (1) proselyting by Church missionaries; (2) land use restrictions imposed on the construction of Church structures; and (3) attempts by bankruptcy trustees to recover sacred tithes and offerings paid by Church members. I shall discuss each in turn.

#### Proselyting By Church Missionaries

By far our largest number of negotiations and discussions involving RFRA have taken place in the proselyting area. After *Smith*, cities and towns across the country took the position that they could force religious proselytors and missionaries to abide by the same rules and regulations that apply to commercial solicitations. These communities passed “generally applicable” and “neutral” ordinances substantially restricting the times when all door-to-door contacting (religious, political, or commercial) could occur. They also required registration by all religious proselytors, imposed strict guidelines regarding where and when proselyting could occur, and, in some instances, even required

missionaries to give the city advance notice of where they would be proselyting in the coming weeks.

When Church representatives challenged these ordinances, city officials and their attorneys responded that in their view the ordinances fell well within the parameters of *Smith*, and therefore they did not have to defend the infringement on religious proselyting under the strict scrutiny standard. Rather, they claimed, *Smith* required them only to identify some rational reason for the strict guidelines, something they could easily do by pointing to safety, aesthetics, or other regulatory concerns.

With RFRA in hand, Church legal representatives were able to convince city officials otherwise. The Church was easily able to show the substantial infringement such laws have on religious beliefs and practices. After this showing, and with the provisions of RFRA in force, city officials were much more sensitive and careful in imposing restrictions against our missionaries, because they understood that those restrictions would be reviewed with the highest of scrutiny.

During the relatively short time RFRA was in force, it provided sufficient protection that city officials were willing to listen and address the concerns of our Church. This occurred in literally dozens of communities located in California, Connecticut, Virginia, Maryland, Washington, D.C., Pennsylvania, Illinois, New Jersey, Oregon, and other states.

### Land Use Restrictions

RFRA had the same effect on our Church's discussions and negotiations in the arena of land-use. Where *Smith's* broad standards had previously made many local communities unwilling to discuss possible solutions to the construction or remodeling of a church building in a certain area, with RFRA's passage they became much more willing to resolve important issues on an informal — and even on a friendly — basis. Rather than merely identifying some potential rational basis in support of their refusal to consider construction or remodeling, city officials felt compelled to review their actions and to determine what compelling governmental interests, if any, really supported the city's decision. This necessity caused reflection, more flexibility, and in many cases, a change of heart by city officials.

Because of various agreements and representations to city officials that we would not make our concerns public if the city would adequately address and resolve them, I am unable to disclose the identities of these various towns and cities, or the specific circumstances involved with each of them. I do assure you that they were numerous, and that the Church is convinced that, without RFRA, we would not have reached acceptable compromises or solutions on many issues of great religious importance to the Church.

### Attempts by Bankruptcy Trustees to Recover Sacred Tithes and Offerings

Beginning shortly after the *Smith* decision, bankruptcy trustees discovered a new claim that had rarely been asserted against churches. This claim sought to apply to sacred

offerings and tithes the general avoidance power of a bankruptcy trustee to recover funds the debtor had contributed without fair value in return. In other words, for virtually the first time, bankruptcy trustees began going after tithes and offerings previously contributed by the debtor, treating those sacred offerings in the same manner as any other funds the debtor may have given away during the several years prior to his filing of bankruptcy.

Literally hundreds of such claims were filed against the Church, seeking full refund of a debtor's sacred tithes and offerings. When faced with constitutional arguments in response, trustees would simply fall back on *Smith*, arguing that the avoidance powers of the bankruptcy code are "generally applicable" and "neutral". RFRA virtually eliminated that argument. When seeking to recover previously contributed sacred tithes, bankruptcy trustees were required to show that they were furthering a compelling governmental interest. They had a hard time doing so. Many trustees forced their position and were unsuccessful. Several courts held that the trustee did not have a compelling governmental interest to recover the debtor's religious contributions. Hundreds of other such claims, however, were never filed. The Church is aware of well over a hundred cases in Utah, Oregon, California, Colorado, Arizona, and Idaho that were never filed as a result of discussions between the Church and the respective trustees. RFRA played the pivotal role in those discussions. When trustees

learned that the test applied to their actions would be one of strict scrutiny, more often than not they chose not to bring the claim.

Mr. Chairman, in the experience of our Church, RFRA played a vital role in compromise and informal resolution of hundreds of infringements on religious practice. We expect the newly introduced RLPA to have a similar effect. Government officials and their legal representatives will be far more inclined to sensitivity toward important religious practices when they know they must defend their actions against strict scrutiny review. In most instances, there will be less posturing and more open discussions between government and churches and synagogues on how both side's interests may be protected. In my opinion, with RLPA in force, governmental officials will spend much less time trying to craft the perfect "generally applicable" and "neutral" statute or regulation that is effectively unchallengeable under *Smith*, and much more time considering the approaches and compromises that will protect the community's important interests and the important religious beliefs and practices of its citizens and residents.

I thank you for this opportunity to supplement the record, and I strongly endorse the action you are taking to move forward on the Religious Liberty Protection Act.

RESPONSES OF RICHARD L. LAND TO QUESTIONS FROM  
SENATOR HATCH

**What is the purpose of the Religious Liberty Protection Act?**

The Religious Liberty Protection Act (RLPA) attempts to protect religious practice from burdensome and unnecessary governmental interference. It requires the government to take a second look at actions that substantially burden the religious practices of individuals and institutions and to ensure that those government actions serve a compelling interest (such as health or safety) in a way that places only the most minimal burden on religion. If the government's actions do not further a compelling interest in the least restrictive manner, then the government would have to accommodate the religious exercise.

**Why is RLPA needed?**

RLPA is needed because two recent decisions of the U.S. Supreme Court have left little protection for religious exercise. In its 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court abandoned use of the traditional compelling interest test for most free exercise claims. Instead, the Court ruled that, as long as a governmental action did not target religion for discriminatory treatment, it would generally pass constitutional muster. In 1993, Congress passed the Religious Freedom Restoration Act, (RFRA), 42 U.S.C. Section 2000bb *et seq.*, which restored broad application of the compelling interest test. Then, in 1997, the Supreme Court struck down parts of RFRA in *City of Boerne v. Flores*, 521 U.S. \_\_\_, 117 S. Ct. 2157 (1997), finding RFRA unconstitutional as applied to state and local governments.

Now RLPA is needed because governmental policies sometimes substantially burden religious practice. In most instances, these burdens could be avoided through limited accommodation, but current federal law generally provides no mechanism to force such negotiation between the person and the state. Where substantial burdens on religious practices are not justified by compelling governmental interests, RLPA would force these negotiations. In this way, RLPA would help religious individuals to avoid having to choose between breaking the law and keeping their faith.

**What are a few of the ways in which governmental policies burden religious practice?**

The following are a few illustrations of the ways in which governmental policies may substantially and unnecessarily burden religious practice:

- A loyalty oath that serves as a precondition of government employment at a community college causes a crisis of conscience for a Jehovah's Witness who wants the job but whose faith instructs against taking such oaths.<sup>1</sup>
- A mandatory autopsy law forces the autopsy of a Orthodox Jewish victim of an automobile accident, causing a severe burden on the religious beliefs of the Jewish

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<sup>1</sup>Testimony of Zari Wigfall before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

family.<sup>2</sup>

- Provisions of federal and state bankruptcy codes are used to force houses of worship to disgorge tithes and offerings previously given in good faith by church members who later file for bankruptcy. This requires churches to undo an act of worship. Moreover, the money would not be recoverable if the bankrupt church member had spent it on luxury cruises or gourmet food, and thus received "value" for the money.<sup>3</sup>
- A prosecuting attorney attempts to force a minister to divulge the contents of a penitent's confession.<sup>4</sup>
- Certain fire and police stations promulgate a blanket "no-beards" rule, interfering with the religious practice of Muslim firefighters and police officers who wear beards as part of well-established Muslim tradition.<sup>5</sup>
- The IRS sues a Quaker organization when the organization would not attach the wages of two former employees who had refused for religious reasons to pay the military portion of their taxes. The Court ruled under Employment Division v. Smith that the levies did not violate the organization's free exercise rights.<sup>6</sup>
- Prison officials repeatedly attempt to use a state law prohibiting the carrying of alcoholic beverages into prison to block the use of sacramental wine in Catholic services.<sup>7</sup>

**Also, land use regulations often undermine the religious vitality of a community. For example:**

- Despite testimony that a congregational meeting had "no discernable impact" on the neighborhood, a city council denies a special use permit to an Orthodox Jewish congregation,

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<sup>2</sup> Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990).

<sup>3</sup>Testimony of the Rev. E. Richard Steel, Pastor of Cedar Bayou Baptist Church, Baytown, Texas before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

<sup>4</sup> Testimony of the Rev. Rich Hamlin, Pastor of Evangelical Reformed Church, Tacoma, Washington, before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

<sup>5</sup>Testimony of Dr. Imad A. (Dean) Ahmad, American Muslim Council Liaison to the Coalition for the Free Exercise of Religion before the House Judiciary Subcommittee on the Constitution, March 26, 1998.

<sup>6</sup> United States v. Philadelphia Yearly Meeting, 753 F. Supp. 1300 (E.D. Pa. 1990).

<sup>7</sup> Testimony of the Rev. Donald W. Brooks, Director of Prison Ministry for the Roman Catholic Archdiocese of Oklahoma City and the Roman Catholic Diocese of Tulsa before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

whose members must walk to Sabbath services. This makes the neighborhood effectively off-limits to Orthodox Jews.<sup>8</sup>

- By forbidding the construction of new houses of worship in a municipality, a city ordinance effectively precludes Mormons from temple worship in the city.<sup>9</sup>
- A city zoning board tries to shut down the homeless feeding ministry of a church despite the fact that the ministry had caused no adverse impact in the neighborhood.<sup>10</sup>
- A municipal historical commission refuses to permit a church to demolish a dilapidated building the church owns. Since 1982, this has resulted in a continuing legal battle between the church and the city and the church's expenditure of almost \$60,000 in legal fees -- money the church could have used to serve the community.<sup>11</sup>

Interestingly, a recent study indicates that, while minority religions represent just less than 9% of the general population, they were involved in over 49% of the cases regarding the right to locate a religious building at a particular site and in over 33% of the cases seeking approval of accessory uses of an existing church site (such as sheltering or feeding the homeless). Furthermore, the study reveals that if one takes into account cases involving non-denominational religious groups and other unclassified religious groups, over 68% of reported location cases and over 50% of accessory use cases involved minority faiths.<sup>12</sup>

### **What powers of Congress support RLPA?**

The Act relies on three Congressional powers: the power to spend, regulate interstate commerce and reach certain conduct under Section 5 of the 14th Amendment. First, RLPA protects individuals participating in federally assisted programs from burdens imposed by the

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<sup>8</sup> Testimony of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California, before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

<sup>9</sup> Order of the Chancery Court for Davidson County, Tennessee in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Board of Commissioners, Nos. 95-1135, 96-868, 96-1421 issued on January 27, 1998.

<sup>10</sup> Testimony of the Rev John W. Wimberly, Pastor of Western Presbyterian Church, Washington, D.C.; Western Presbyterian v Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994); see also Testimony of the Rev. Patrick J. Wilson III, Pastor of Trinity Baptist Church, Richmond, Virginia, before the House Judiciary Subcommittee on the Constitution, February 26, 1998; Stuart Circle Parish v. Board of Zoning Appeals, 1996 WL 685755 (E.D. Va. 1996).

<sup>11</sup> Testimony of Dr. Richard Robb, Member of First Presbyterian Church of Ypsilanti, Michigan before the House Judiciary Subcommittee on the Constitution, February 26, 1998.

<sup>12</sup> Testimony of Von G. Keetch, Counsel to the Church of Jesus Christ of Latter-day Saints before the House Judiciary Subcommittee on the Constitution, March 26, 1998 at 8-9, Appendix.

government as a condition of participating in or benefiting from the program. For example, an individual could not be excluded from or discriminated against in a federally assisted program because of his or her religious dress or observance of holidays -- unless these burdens served a compelling interest by the least restrictive means.

Second, RLPA protects religious exercise in or affecting commerce (e.g., when burdensome regulation prevents a church from building a house of worship, it affects tens of thousands or even millions of dollars of commerce). It makes no sense that religious entities sometimes can be regulated due to their effect on interstate commerce, but cannot be protected from regulation.

Third, RLPA makes use of the power of Congress to enforce rights under Section 5 of the 14th Amendment consistent with the U.S. Supreme Court's decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997). It attempts to simplify litigation of free exercise violations as defined by the Supreme Court. RLPA also specifically addresses the problems of religious institutions that are substantially burdened by land use regulation. Evidence shows that individualized determinations in land use regulation frequently burden religion and frequently discriminate, especially against minority faiths. Accordingly, RLPA prohibits land use regulation that substantially burdens religious exercise, unless it is the least restrictive way to prevent substantial and tangible harm to neighboring properties or to public health or safety. RLPA also prohibits governmental denial of a reasonable location for religious assemblies within the jurisdiction and the exclusion of religious assemblies from areas in which nonreligious assemblies are permitted.

#### **Can RLPA survive constitutional challenge after the U.S. Supreme Court's decision in City of Boerne v. Flores?**

Yes. In City of Boerne v. Flores, the Supreme Court struck down parts of the Religious Freedom Restoration Act of 1993 (RFRA) as unconstitutional. The Court found that Congress did not have the power under Section 5 of the 14th Amendment to apply RFRA to states and localities. RFRA continues to bind the federal government. Christians v. Crystal Free Evangelical Church, No. 93-2267, 1998 U.S. App. LEXIS 7348 (8th Cir. 1998).

To the extent RLPA relies on Section 5 of the 14th Amendment, it does so in a very limited and targeted way. It accepts the Supreme Court's definition of free exercise violations and then seeks to simplify litigation to enforce those rights. It also relies on extensive Congressional fact-finding to target one particularly troubling area of governmental interference with religious practice: land use regulation. The Supreme Court's decision in City of Boerne left room for such determinations and related legislation. And, of course, RLPA differs from RFRA in that it relies on different powers of Congress: the spending and interstate commerce powers.

#### **Can RLPA survive constitutional challenge under current interpretations of Congress' power to spend?**

Yes. Congressional power to attach conditions to federal spending must be "[r]elated to the federal interest in particular national projects or programs." South Dakota v. Dole, 483 U.S. 203, 207 (1987). In Dole, the Supreme Court upheld a requirement that states change their legal drinking age as a condition of receiving federal highway funds, finding the condition directly related to safe interstate travel and commenting that the issue was easy to decide. Id. at 208.

The connection between the federal assistance and the condition imposed on that assistance in RLPA is even tighter. The federal interest in RLPA is that the beneficiaries of federal programs not be excluded because of their religious practice, and that federal funds not be used to impose

unnecessary burdens on religious exercise. The condition in Dole went beyond the core concern of requiring that all citizens be able to benefit from the highway grant. If the condition in Dole was directly related to a federal interest, then RLPA would seem to present an easier case. Federal aid to one program, however, does not empower Congress to demand compliance with RLPA in other programs.

**Can RLPA survive constitutional challenge under current interpretations of Congress' power to regulate interstate commerce?**

Yes. RLPA specifically notes that it protects only religious exercise that Congress is empowered to protect under the Commerce Clause. Models for RLPA's provisions include the Privacy Protection Act of 1980, 42 U.S.C. Section 2000aa(1994), protecting papers and documents in preparation for a publication in or affecting commerce, which has not been seriously challenged, and the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a (1994), forbidding racial and religious discrimination in places of public accommodation affecting commerce, and irrebuttably presuming that commerce is affected by any hotel and by any restaurant that serves interstate travelers. This Civil Rights Act was upheld in Katzenbach v. McClung, 379 U.S. 294 (1964) and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Because this provision would only affect religious practices that affect commercial transactions, it should not be vulnerable under United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995).

**Can RLPA survive constitutional challenge under current interpretations of the Establishment Clause?**

Yes. The Supreme Court has recognized that the First Amendment permits legislatures to protect religious exercise from burdensome governmental interference. See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Employment Division v. Smith, 494 U.S. at 890. When the legislature does this, it is not itself advancing religion; it is accommodating religion by lifting burdens on religious people and institutions so that they can advance their religion. Moreover, RLPA specifically states that it has no effect whatever on the Establishment Clause. In City of Boerne v. Flores, only Justice Stevens believed that RFRA violated the Establishment Clause.

**Does RLPA unconstitutionally impose specific affirmative duties on state officers to implement federal programs?**

No. RLPA does not impose any specific affirmative duty, implement a federal regulatory program or conscript state officers. The substantive provisions of the bill are entirely negative; they define one thing the states cannot do, leaving all other options open. The bill thus preempts state laws inconsistent with the overriding federal policy of protecting religious liberty in areas constitutionally subject to federal authority. Thus, RLPA does not run afoul of the Supreme Court's judgment in Printz v. United States that Congress "cannot compel the States to enact or enforce a federal regulatory program," and that it "cannot circumvent that prohibition by conscripting State's officers directly." Printz v. United States, 117 S. Ct. 2365, 2384 (1997).

**Who supports RLPA?**

One of the broadest coalitions in recent political history, the Coalition for the Free Exercise of Religion. This organization of over eighty religious and civil liberties groups includes Agudath Israel, the Aleph Institute, the American Civil Liberties Union, the American Jewish Congress, the

American Jewish Committee, Americans United for Separation of Church and State, the Anti-Defamation League, the Baptist Joint Committee on Public Affairs, the Christian Legal Society, the Church of Jesus Christ of Latter-day Saints, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, Justice Fellowship, the National Association for Evangelicals, the National Council of Churches, People for the American Way and the Union of American Hebrew Congregations. The United States Catholic Conference, the Family Research Council and Focus on the Family also support RLPA. These groups don't agree on much, but they are individually and collectively committed to advancing religious liberty for all Americans.

**Will RLPA threaten prison security and force correction officials to accept a broad range of practices with dubious religious connections?**

No. Although RLPA would apply to prison claims in certain instances, RLPA does not require prison officials to grant religious requests that would undermine prison discipline, order and security, which courts have recognized as compelling governmental interests justifying restriction of religious liberty. Also, frivolous claims can be easily rejected under RLPA's framework. Indeed, RLPA specifically provides that it is subject to the Prison Litigation Reform Act.

**Will RLPA be as broad as the Religious Freedom Restoration Act of 1993?**

No. RFRA relied on Section 5 of the 14th Amendment and sought to reach any substantial, governmental burden placed on religious exercise. Now that the Supreme Court has held that Congress' power is not this broad, subsequent legislation must be more narrow. RLPA will only reach conduct that involves federal funding, interstate commerce or lies within Congress' power under Section 5 of the 14th Amendment after City of Boerne v. Flores.

Because RLPA will be more limited than RFRA, the Coalition for the Free Exercise of Religion has encouraged the adoption of state Religious Freedom Restoration Acts that provide religious freedom for all. Where they are adopted, such state laws will provide wall-to-wall protection against unnecessary burdens on the free exercise of religion.



RESPONSES OF RABBI DAVID ZWIEBEL TO QUESTIONS FROM  
SENATOR HATCH

July 7, 1998

The Honorable Orrin G. Hatch  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

21

It was a great honor for me to testify on June 23 before the Senate Judiciary Committee in support of S. 1248, the "Religious Liberty Protection Act" (RLPA). Let me take this opportunity to express Agudath Israel of America's heartfelt appreciation to you for co-sponsoring this important piece of legislation.

The purpose of this letter is to supplement my written and oral testimony by responding to your correspondence of June 24 and, specifically, to the question you posed concerning how valuable we believe the Religious Freedom Restoration Act (RFRA) has been, and presumably RLPA will be, in negotiating government accommodation for religious practices -- without the need for litigation.

Our response to this question is unequivocal: The "compelling state interest" test, as first enunciated by the Supreme Court in its pre-Employment Division v. Smith reading of the Free Exercise Clause, and later enshrined in RFRA, has been a useful and effective tool in averting federal and state infringements upon religious practice. The very existence of a "standard" that government was required to meet encouraged the parties to sit down together and discuss the problem with an eye toward accommodation, rather than conflict. More often than not, what resulted in the process was an exchange of ideas and information, a mutual understanding of the needs and objectives of both government and individual, and an acceptable resolution that would achieve the legitimate goals of government in protecting its citizenry without burdening a person's sincerely-held religious beliefs. Simply put, a "strict scrutiny" standard made the parties to the dispute more aware of their rights and responsibilities, and more amenable to resolving issues outside of court. Without this standard, we can only assume -- and experience over the past year has, indeed, begun to show -- that accommodations which could have otherwise been reached will all too often be dismissed out of hand.

We can illustrate our point by offering a few examples of problems that arose within the religiously-observant Jewish community when the "compelling interest" test was in effect -- either in the context of the Free Exercise Clause or of RFRA -- and that were worked out through negotiation, rather than litigation. These include:

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1. Autopsies -- In recent testimony before the House Subcommittee on the Constitution, Marc Stern, Co-Director of the American Jewish Congress' Commission on Law and Social Action, related the case of an Orthodox Jew who was killed when two trains collided several years ago outside of New York City. There was absolutely no doubt as to the cause of death. Nonetheless, despite the family's religious objections, the coroner insisted that an autopsy be performed. It was only after a RFRA suit was threatened that the coroner decided to reconsider the issue and allow an alternative procedure -- a CAT scan -- to be employed that would be equally effective in determining the cause of death.
  
2. Religious Observance in Prison -- One of the most difficult areas we have faced in regard to free exercise claims relates to the accommodation of the religious rights of federal and state inmates. As I testified at the June 23 hearing, a recent example of the effect RFRA has had in this area involved a policy adopted a few years ago by the New York State Department of Corrections that allowed exemptions, for religious reasons, to the general requirement that inmates could not allow their beards or moustaches to exceed one inch in length. This policy came about as part of a negotiated settlement of a challenge brought by a Hasidic Jewish inmate who refused to shave his beard for religious reasons. Several months ago, however, all superintendents were notified that the exemption providing for religious accommodation was premised upon the state's responsibilities under RFRA, and that now with the Supreme Court's ruling in City of Boerne v. Flores, exemptions would no longer be granted.

There were other religious obstacles that inmates faced in prison that were resolved because of RFRA. Consider the first-hand observation of Yosef Florian, a Jewish inmate at Parnall Correctional Facility in Jackson, Michigan, who expressed the following in a letter he wrote to a national Jewish organization:

[RFRA has had many] positive effects such as Passover Sedars in prisons! Some prisons ban Tallis and Tefillin but RFRA protected the Jewish prisoners right. We eat kosher meals because the RFRA and I can wear my yarmulke on visits and during anytime in prison because of RFRA. We lit Chanukah candles too. They televised [on "Dateline"] the same show over and over about ridiculous religious lawsuits and never showed the real heartfelt meaningful lawsuits that protected Jewish prisoners' religious right to practice Judaism.

3. Yarmulkes -- Another instructive case Mr. Stern referred to in his House testimony occurred shortly before the Supreme Court handed down its decision

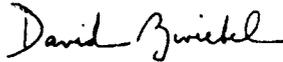
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in *Smith*. That case involved a Jewish boy who wished to wear a yarmulke in a public school in South Carolina. The school district, however, had a rule barring the wearing of hats during school hours. The school board was not impressed by the fact that this head covering was worn for religious reasons and surely did not raise the "anti-gang" concerns that prompted issuance of the rule in the first place. Once again, it was only after the threat of a lawsuit under the then-prevailing "compelling state interest" standard that the school board rethought a waiver to the "no hat" rule and decided to accommodate the student.

These are but a few examples of how the existence of a "compelling state interest" standard has served as a meaningful tool in negotiating government accommodation of religious practices. In fact, we believe that many potential conflicts were resolved outside of court because of the pre-*Smith* Free Exercise Clause standard and then because of RFRA. They are unknown to the public, however, since they went unreported and remain a private matter between the parties.

Mr. Chairman, as I mentioned at the hearing, there is unanimity within the Jewish community, and within an extraordinarily broad coalition of religious and civil rights groups, that the enactment of RLPA will go far in recouping the losses religiously-observant Americans have suffered as a result of recent decisions of the Supreme Court. We urge the Senate to act swiftly and pass this important piece of legislation before it adjourns.

Sincerely yours,



Rabbi David Zwiebel  
Director of Government Affairs  
and General Counsel



RESPONSES OF ELLIOT M. MINCEBERG TO QUESTIONS FROM  
SENATOR HATCH

July 2, 1998

Senator Orrin G. Hatch  
Chairman, Senate Committee on the  
Judiciary  
Washington, D.C. 20510-6275

Dear Senator Hatch:

Thank you very much for your letter of June 24 and for inviting me to testify at the Judiciary Committee's June 23, 1998 hearing on the Religious Liberty Protection Act. As you requested, I am writing to respond to the written question enclosed with your letter.

The question was as follows: "Many commentators on RFRA focus solely on the reported cases in judging its effectiveness. Could you explain how important RFRA was in negotiating accommodations outside of litigation, and how important the enactment of RLPA will be to you in similarly resolving disputes outside of court? Please, to the extent you can, supplement your oral answers from the hearing with further examples for the written record."

In response, as I testified at the hearing, I do believe that RFRA was very important in seeking to negotiate accommodations outside of litigation with respect to government practices that imposed a substantial burden on religious free exercise. I also believe that RLPA will similarly be very important in resolving disputes on such matters out of court. This is because RFRA and RLPA effectively require a government that may be burdening religious free exercise to take a "second look" at the issue in order to avoid possible litigation, and in many instances, such a second look allows a reasonable accommodation to be worked out among the affected parties. Unfortunately, without RFRA or RLPA, many busy government agencies may simply never take that second look, leading to unnecessary burdens on religious free exercise.

I am aware of several examples, which occurred either under RFRA or under the Free Exercise Clause prior to the Smith case. These examples are also mentioned or described in the testimony concerning RLPA of Rev. Donald Brooks and of Marc Stern of the

American Jewish Congress before the House Judiciary Committee. Specifically:

First, within the past year, the director of an INS detention facility had refused to provide detainees with pork-free diets mandated by their religious beliefs. But because President Clinton had ordered federal officials to seek to comply with RFRA, negotiations were successful and, without litigation, the director agreed to provide a pork-free diet.

Second, shortly prior to the Supreme Court's decision in the Smith case, a controversy was settled concerning a South Carolina school district's rule that prohibited the wearing of hats in school. The rule was applied to an Orthodox Jewish boy who wanted to wear a yarmulke to school, as Orthodox Jewish practice requires. Under the pre-Smith free exercise doctrine, the possibility of a First Amendment lawsuit was raised, and the district agreed to accommodate the youngster's religious beliefs.

Third, after RFRA was passed and was still in force, it was utilized on at least one occasion to reach a reasonable accommodation on the issue of performance of an autopsy. As Mr. Stern has described, in a tragic case involving a train accident, a coroner insisted on an autopsy as the condition for certifying the cause of death. The family of the deceased objected on religious grounds. Because the possibility of litigation under RFRA produced a "second look," the family's religious beliefs were accommodated through the performance of a CAT scan rather than an autopsy. Unfortunately, in several reported cases prior to RFRA and after Smith, autopsies were performed despite religious objections in several similar cases.

Fourth, while RFRA was in effect, prison officials in Michigan agreed on an accommodation for Jewish prisoners who wished to light candles to celebrate the holiday of Chanukah. Although officials initially resisted any accommodation on security and safety grounds, RFRA helped produce a settlement in which all parties agreed that such concerns were satisfied while accommodating the religious free exercise.

Fifth, while RFRA was in effect, New York State modified its rules to follow the federal practice of allowing beards to be worn for religious reasons. After Boerne, however, state officials revoked the rule, demonstrating dramatically the importance of RFRA in producing such accommodations.

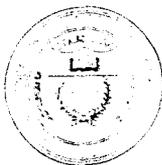
Finally, prior to RFRA, Oklahoma prison officials had interpreted an anti-contraband statute as forbidding the use of sacramental wine with communion for Catholic prisoners. After RFRA, without litigation, officials agreed to interpret and apply the law so that such use of sacramental wine was permitted.

I hope that this information will be useful to the Committee. Please do not hesitate to contact me if I can be of any further assistance, and thank you again for inviting me to testify.

Sincerely,



Elliot M. Mincberg  
General Counsel



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RESPONSES OF DOUGLASS LAYCOCK TO QUESTIONS FROM  
SENATOR HATCH

July 7, 1998

Hon. Orrin G. Hatch  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510-6275

Dear Senator Hatch:

I write to answer the questions propounded in your letter of June 24, 1998, supplemental to the June 23 hearing on the Religious Liberty Protection Act. As always, I answer in my individual capacity as a scholar.

**Questions from Senator Hatch**

**1. Has Congress not frequently imposed general conditions on the receipt of federal funds, such as the requirement in Title VI that no program receiving federal funds may engage in racial discrimination? How is RLPA, insofar as it relies on the Spending Clause, any different?**

Yes, Congress has frequently imposed such conditions. I do not see how RLPA is any different. Professor Eisgruber suggested that Title VI imposes a nondiscrimination condition, and that RLPA does not. But this is wrong in at least two ways.

First, the Spending Clause section of RLPA is a nondiscrimination provision. It is designed to ensure that no intended beneficiary of federal funds lose the benefit of those funds because of his or her religious practice, just as Title VI is designed to ensure that no intended beneficiary loses benefits because of race. The same concept appears in Title VII, which prohibits discrimination based on religion and then defines religion to include "all aspects of religious observance and practice." 42 U.S.C. §2000e(j) (1994).

Second, and more fundamental, such distinctions are irrelevant to the Spending Clause. Provisions to enforce the Fourteenth Amendment must be aimed at discrimination. But provisions based on the Spending Clause need only be reasonably related to the federal spending program. For example, the requirement that states change their drinking age, upheld as a condition on federal spending in *South Dakota v. Dole*, 483 U.S. 203 (1987), was obviously not a nondiscrimination rule. The requirement that states maintain a federal schedule for preparing to dispose of nuclear waste, unanimously upheld as a condition on federal spending in *New York v. United States*, 505 U.S. 144 (1992), was obviously not a nondiscrimination rule. And as the Court said in *New York*, "Similar examples abound." *Id.* at 167.

**2. Professor Hamilton objects to the RLPA as ultra vires under the Spending and Commerce Clauses, citing *Boerne*. Professor Hamilton, could you explain what the *Boerne* decision has to do with whether RLPA is a legitimate exercise of Congress' Commerce Clause or Spending powers? Are "proportionality" and "congruence" relevant to the limits of Congress' power to regulate commerce or to put limits on the use of federal funds?**

*Boerne* has nothing to do with the Spending and Commerce Clauses. On the face of the opinion, on the issues presented, and on the facts of the case, *Boerne* is an opinion about the Enforcement Clause of the Fourteenth Amendment.

It says nothing about Congressional power to protect religious liberty under Article I powers. That is why RFRA remains valid as applied to federal law. *In re Young*, 141 F.3d 854 (8th Cir. 1998), *petition for cert. filed*, (No. 97-1744); *EEOC v. Catholic University*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). Both courts were dismissive of arguments quite similar to those that Professor Hamilton has made in this hearing.

With respect to the Spending Clause, if Congress imposes a condition that is relevant to the purposes of the federal spending program, and which does not violate a constitutional right, it is irrelevant that that condition is somehow related to, or in the vicinity of, a constitutional right. I know of no modern cases striking down Spending Clause conditions as insufficiently related to the spending program.

There has been more litigation under the Commerce Clause, but the claim that Congress cannot use the commerce power if its purpose or motive is noncommercial has been rejected since the nineteenth century. *United States v. Darby*, 312 U.S. 100, 115 (1941) ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause," upholding the Fair Labor Standards Act and overruling an earlier decision striking down the child labor laws); *Hoke v. United States*, 227 U.S. 308 (1913) (upholding Congressional power to ban interstate transportation of prostitutes); *Champion v. Ames*, 188 U.S. 321 (1895) (upholding Congressional power to ban lottery tickets from interstate commerce). Note that in *Hoke* and *Champion*, the federal legislation prohibited commerce instead of promoting commerce, and almost certainly reduced the volume of commerce. These cases are utterly inconsistent with Professor Eisgruber's theory that Congress must act to promote commerce, and with Professor Hamilton's theory that Congress can act only for certain approved purposes.

The scope of Article I powers does not change when Congress uses them to protect constitutional rights, or when it acts in the area of First Amendment rights. Recent examples include the cases upholding the Freedom of Access to Clinic Entrances Act under the Commerce Clause. *United States v. Soderna*, 82 F.3d 1370 (7th Cir.), *cert. denied*, 117 S.Ct. 507 (1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.), *cert. denied*, 117 S.Ct. 613 (1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 516 U.S. 809 (1995). As Judge Posner said in the Seventh Circuit case:

The fact that the motive for the Freedom of Access to Clinic Entrances Act was not to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant. Congress can regulate interstate commerce for any lawful motive.

*Soderna*, 82 F.3d at 1374. These cases, most of them decided after *United States v. Lopez*, 514 U.S. 549 (1995), are inconsistent with the theory that the scope of Article I power depends on Congress's purpose or motive, and inconsistent with Professor Hamilton's theory that Congress cannot use the commerce power in the area of First Amendment rights. The courts found an effect on commerce, and no violation of the First Amendment; nothing more was required. The courts did not mention proportionality to or congruence with the Supreme Court's understanding of the right to reproductive choice, which the Act was designed to protect. It was not mentioned because it was utterly irrelevant to the scope of Article I power.

No one has even challenged the Privacy Protection Act, 42 U.S.C. §2000aa et seq. (1994) (codified in a chapter entitled First Amendment Privacy Protection.) This Act supplements constitutional protection for the rights of reporters, editors, publishers, and publications "in or affecting interstate or foreign

commerce." The Act provides statutory protection that the Supreme Court had refused to provide under the Constitution. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Professor William Van Alstyne, who argued that RFRA was unconstitutional as applied to the states, noted that the Privacy Protection Act raised no similar issue, precisely because it was based on the Commerce Clause and confined to cases affecting commerce. "It makes no claim of a supererogatory power in Congress of the sort asserted in RFRA." William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291, 325 (1996).

Some of the constitutional arguments being offered against RLPA are extraordinary and without support in any precedent. The voices and arguments being raised to claim that Congress cannot use Article I powers to protect religious liberty were not raised to argue that Congress could not use Article I powers to protect freedom of speech, freedom from unreasonable searches and seizures, or the right to reproductive choice. The appearance of these arguments in this debate illustrates the deep hostility to any substantive right to religious liberty in certain parts of the society -- hostility that is part of the reason that RLPA is so needed.

**3. Could each of you explain what you believe is the test, in your view, for determining whether this legislation is a legitimate exercise of Congress' power under the Commerce Clause? What case law support is there for your interpretation of the Commerce power?**

The test is whether in each case, the burdened religious exercise affects commerce, or compliance with the burdensome regulation affects commerce. If either affects commerce in a particular case, then the aggregation of all such cases would substantially affect commerce, and the application of RLPA to such cases would be a valid exercise of the commerce power.

The easiest cases would be regulations that hamper the operation of religious institutions, or burden activities that are both religious and economic, such as church construction and church employment. Another set of cases would be those in which the religious activity requires the use of goods or services that are bought and sold in interstate commerce, such as a restriction that prevented use of Kosher food or other ritual items. Still another set of cases would be those in which the interaction of the regulation and the religious practice prevented commercial activity by the believer. An example is the cases of people who believe that all photographs are graven images, and thus cannot get a driver's license without accommodation.

Ample authority supports this understanding of the Commerce Clause. Most recently, in *Camps Newfound/Owatonna v. Town of Harrison*, 117 S.Ct. 1590 (1997), the Court held that a not-for-profit religious camp was protected by the dormant commerce clause. "[A]lthough the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of non-profit entities as a class are unquestionably significant." *Id.* at 1603. Because the camp affected commerce, it was protected from a discriminatory real estate tax, without separate inquiry into whether its ownership of real estate affected commerce.

*United States v. Lopez*, 514 U.S. 549 (1995), reaffirms the rule that Congress may regulate even "trivial" or "de minimis" intrastate transactions if those transactions, "taken together with many others similarly situated," substantially affect interstate commerce. *Id.* at 556, 558.

The Access to Clinics Act cases cited above are directly analogous to RLPA. The disruptive acts of protestors made it more difficult for women to walk from the street or parking lot to the clinic entrance. This walk had no economic significance in itself, but this walk led to a transaction with commercial consequences that affected interstate commerce. Similarly here,

religious acts will sometimes have no economic significance in themselves, but they will lead to commercial transactions such as the purchase of supplies, the employment of labor, or the construction of churches.

**4. Professor Eisgruber objects to the burden-shifting provision of Section 3(a) of the bill as "attempt[ing] to deprive the courts of the authority to interpret the Constitution" and as specifying a "rule of decision" for the courts. Professor Hamilton objects to provisions of S. 2148 on the basis of *Marbury v. Madison*, presumably for similar reasons. How can that be, given that the bill requires a showing of a constitutional violation under the courts' current jurisprudence and leaves the ultimate legal standards and decisions to courts?**

I think Professors Eisgruber and Hamilton are making two different arguments, but both arguments are absurd.

Professor Eisgruber's argument is based on the obscure nineteenth-century decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). He says that §3(a) requires courts to decide cases in ways inconsistent with the courts' real views. This is not what *Klein* says, and it is certainly not how *Klein* has been interpreted.

In modern times, the Court has not explained what *Klein* means, but it has been clear about what *Klein* does not mean. In 1992 and again in 1995, the Court explained that Congress can enact rules of decision for cases in the courts (that is what statutes do) so long as it does so by amending applicable law and not by instructing the courts how to interpret existing law. "Whatever the precise scope of *Klein*, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), citing *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992). To similar effect, see *Pope v. United States*, 323 U.S. 1, 9 (1944) (no *Klein* violation,

because "the Act's purpose and effect seem to have been to create a new obligation").

Following this interpretation, five out of six courts of appeals -- all but the Ninth Circuit -- have rejected *Klein*-based attacks on the Prison Litigation Reform Act. *Tyler v. Murphy*, 135 F.3d 594, 597 (8th Cir. 1998); *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir. 1998), *cert. denied*, 66 U.S.L.W. 3814 (June 26, 1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657-58 (1st Cir. 1997), *cert. denied*, 66 U.S.L.W. 3813 (June 26, 1998); *Benjamin v. Johnson*, 124 F.3d 162, 173-74 (2d Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3815 (June 26, 1998); *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 2460 (1997); *see also Dougan v. Singletary*, 129 F.3d 1424, 1426 n.10 (11th Cir. 1997) (noting that inmates there had not made the *Klein* argument), *cert. denied*, 66 U.S.L.W. 3816 (June 26, 1998); *but cf. Taylor v. United States*, 1998 Westlaw 214578 at \*8 (9th Cir., May 4, 1998) (relying in part on *Klein* to invalidate the PLRA as applied to reopening of final judgments). Note that the only disagreement is about the reopening of final judgments, which would never happen under RLPA. It seems likely that the Supreme Court will hear *Taylor*, but quite unlikely that *Klein* will be reinterpreted in a way that casts doubt on RLPA. The prison reform cases show that the disputed boundaries of Congressional power to change applicable law are well beyond the proposals in RLPA.

Section 3(a) of RLPA raises no serious question under the Supreme Court's interpretation of *Klein*. Congress has changed the law applicable to burden of persuasion. If this violated *Klein*, Congressional authority over the Federal Rules of Evidence would violate *Klein*, the burden-shifting provisions in the Civil Rights Act of 1991 would violate *Klein*, and every statute that changed an element of a claim or offense to an affirmative defense (or vice versa) would violate *Klein*. Burden-shifting and other evidentiary statutes do not tell courts how to decide cases; they change applicable law and leave interpretation

and application of that law "entirely in the hands of the courts." *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997).

*Klein* itself involved an appropriations rider barring claims by pardoned rebels to recover property seized during the Civil War. 80 U.S. (13 Wall.) at 133-34. The rider's "great and controlling purpose [was] to deny to pardons granted by the President the effect which [the Supreme] court had adjudged them to have." *Id.* at 145. The essence of *Klein* is that "the legislature cannot change the effect of such a pardon." *Id.* at 148. The rider was invalid because it interfered with the pardon power.

*Klein* also said that the rider was invalid because it required the Court to decide specific cases in favor of the government and in ways contrary to the Court's own judgment. *Id.* at 146-47. But the Court distinguished and reaffirmed *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), in which Congress had changed the result in a particular case by passing new legislation applicable only to that case. The Court had held a bridge to be a nuisance; Congress passed a statute providing that the bridge was not a nuisance, and the Court enforced the new statute.

The modern cases make it clear that *Wheeling Bridge* is the general rule and that *Klein* is the narrow exception. The *Klein* Court said of *Wheeling Bridge* that "no arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act." 80 U.S. (13 Wall.) at 146-47. But in *Klein*, "no new circumstances have been created by the legislation." *Id.* at 147. The difference may have been partly a matter of form; the rider in *Klein* could be read as instructions to the courts for specific cases rather than as a general change in applicable law. But more fundamentally, Congress *could not* change the applicable law, because it had no power to limit the President's pardon power. An attempt to change the legal effect of a pardon interfered with the President's pardon power; an attempt to tell

the judges to ignore what Congress could not change interfered with the judicial power to decide cases. This is the best reading of *Klein* and perhaps the only plausible reading. There is no comparable inability of Congress to legislate concerning the burden of persuasion in various categories of cases.

Professor Hamilton's argument based on *Marbury v. Madison* seems to be that when Congress disagrees with the Supreme Court, it is utterly disabled. Not only can it not act in a way that violates the principle of the Court's decision, but it cannot act in any other way, or on the basis of any other power or principal, if the effect is to produce a result different from the one the Court produced. This is not the law; it has never been the law. *Wheeling Bridge* in the previous paragraph is inconsistent with this proposition.

The argument is squarely rejected in *In re Young*, 141 F.3d 854, 860 (8th Cir. 1998), upholding RFRA as applied to federal law, and citing several earlier examples: the Privacy Protection Act, already discussed; the act protecting conservative religious attire in the military, producing a result inconsistent with *Goldman v. Weinberger*, 475 U.S. 503 (1986), and the Pregnancy Discrimination Act, producing a result inconsistent with *Geduldig v. Aiello*, 417 U.S. 484 (1974). "[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place." *United States v. Marengo County*, 731 F.2d 1546, 1562 (11th Cir.) (upholding the Voting Rights Act of 1982), *appeal dismissed and cert. denied*, 469 U.S. 976 (1984).

Perhaps the most obvious analogy to RLPA is the public accommodations provisions of the Civil Rights Act of 1964, upheld under the Commerce Clause after quite similar legislation had been struck down under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. Compare *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), with *Civil Rights*

*Cases*, 109 U.S. 3 (1883). The Court noted that failure to consider the Commerce Clause in the *Civil Rights Cases* "renders the opinion devoid of authority for the proposition" at issue in *Heart of Atlanta*. 379 U.S. at 252. Similarly here, *Boerne* is "devoid of authority" on the Commerce Clause and Spending Clause issues, and its holding that Congress has no substantive power under the Enforcement Clause of the Fourteenth Amendment does not invalidate a remedial provision such as §3(a).

If Congress tried to re-enact RFRA under the Enforcement Clause of the Fourteenth Amendment, it would be defying the Court's decision in *Boerne*, and *Marbury* would be implicated. But §3(a) accepts every substantive element of the Court's interpretation of the Free Exercise Clause, and simply legislates about burden of persuasion, a matter within the remedial understanding of the enforcement power as interpreted in *Boerne*, and quite possibly within Congress's general power to provide for Article III courts.

**5. Is the burden-shifting provision of 3(a) not wholly consistent with other civil rights laws?**

Burden-shifting provisions are common in civil rights laws, but it may be that none are precisely analogous to §3(a). Some go further, and some go not quite as far.

Congress has shifted burdens of persuasion on statutory causes of action. 42 U.S.C. §2000e-2(k) (1994) is entitled "Burden of proof in disparate impact cases," and it reallocates burdens of proof. 42 U.S.C. §2000e-2(m) (1994), when combined with §2000e-5(g)(2)(B) (1994), is effectively a burden-shifting provision for mixed-motive cases. Each of these provisions involves the burden of proof on rights created by Congress, where Congress arguably has greater power than with respect to litigation of constitutional rights. But as applied to employment by state and local governments, these are acts to

enforce the Fourteenth Amendment, and in that context, they are analogous to §3(a) of RLPA.

Most remedial legislation under the Enforcement Clause of the Fourteenth Amendment creates a statutory right with somewhat different elements from the underlying constitutional right, and shifts the burden of persuasion on some of those elements. It is common for civil rights acts to require the claimant to prove a burden, impact, or result, and then shift to government the burden of justifying that burden, impact, or result. The disparate impact provisions of Title VII operate in this way, as does the Voting Rights Act of 1982.

Section 3(a) arguably goes further than provisions that shift the burden on statutory rights, because it shifts the burden on constitutional rights the elements of which are determined by the Court. But §3(a) does not go nearly so far as other enforcement legislation that dispenses with proof of the underlying constitutional right *and* shifts the burden of proof. Section 3(a) incorporates every detail of the Supreme Court's interpretation of the Free Exercise Clause. It simply says that when the court is in doubt about whether those elements have been proved -- whatever those elements may be -- it should resolve doubts in favor of the alleged constitutional right instead of against the constitutional right. In many of the cases affected by this provision, there will be a constitutional violation under the Supreme Court's standards -- that is what it means to say that the court is uncertain whether there is a violation or not -- and Congress can provide a remedy for this category of cases.

Perhaps the closest analogy is the mixed-motive provisions of Title VII as applied to governmental employment, which enforce an underlying constitutional right, accept the motive requirement the Court has read into that right, and shift the burden of persuasion on certain issues related to motive.

**6. Assuming that the subject matter regulated by RLPA is within Congress' power to regulate under the**

**Commerce and Spending Clauses, do you really think there is an independent separation of powers problem with this bill?**

No. See my answer to Question 4, which discusses the separation of powers issues.

**7. If the answer to the above question is "yes," do you think Congress has power to impose a compelling-interest test within those areas governed by its enumerated powers, as long as it does so with the intent to protect religious freedom, and not with the intent to "overrule" or "second-guess" the Supreme Court's decision in *Smith*? If so, why should the constitutionality of the legislation turn on our intent in passing it?**

My answer to the above question was no. But I do think it is a better and more accurate statement of what Congress is doing to explain that Congress is providing statutory protection for religious liberty within the areas reached by its enumerated powers, and not to use the misleading shorthand that Congress is overruling *Smith*. *Smith* remains the law of the Constitution, as everyone understands. It is commonplace under RFRA, and it will be commonplace under RLPA, for plaintiffs to plead a statutory count and a constitutional count, clearly understanding the difference between them and setting out the distinct elements of each. RLPA makes no attempt to change the Court's interpretation of the Free Exercise Clause.

**8. Professor Hamilton, in response to a question about whether the test of constitutionality was Congress' motivation, drew a distinction between Congress' motivation and the legislation's purpose and asserted that this difference was grounded in case law. What is this case law, and do any of the rest of you see the same distinction? What is the proper test of constitutionality, legislative motive, purpose, a structural/power inquiry, or something else?**

The Court has attempted on occasion to distinguish motive from purpose, and the distinction has figured in disagreements among the Justices over the meaning of *Smith*. Justice Kennedy has assumed that *Smith* is primarily about governmental actions taken with anti-religious motive. This is suggested by his reliance on anti-Santeria motive in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993), and by his unelaborated references to "religious bigotry" in *Boerne*. But the motive part of his opinion in *Lukumi* drew only two votes, and the phrase "religious bigotry" does not appear in either *Smith* or *Lukumi*.

Justice Scalia wrote separately in *Lukumi* to reject Justice Kennedy's reliance on motive. 508 U.S. at 558-59 (concurring). He argued that constitutionality under *Smith* depends "on the object of the laws at issue" and not on "the subjective motivation of the lawmakers." *Id.* at 558. I believe that Justice Scalia means by "object" approximately what Professor Hamilton means by "purpose," although Justice Scalia later says that "the First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted," *id.*, using "purpose" as a synonym for motive. And of course this passage seems to endorse an effects test, although he expressly rejected an effects test in *Smith*. 494 U.S. 872, 886 n.3 (1990). And like Justice Kennedy's discussion of motive, Justice Scalia's discussion of motive, purpose, and object drew only two votes. Neither opinion represents the view of the Court; five Justices sat out this debate.

There is obviously some confusion in vocabulary here, and possibly in concept. But I think there is a distinction between what the statute attempts to do (sometimes described as purpose), and the reasons Congress wants to do that (sometimes described as motive). The statutory purpose of RLPA is to protect religious liberty to the extent of Congressional power to do so. Different Senators may support the bill for quite different motives: a strong commitment to civil liberties generally, or a strong commitment to religious liberty in

particular, or a strong commitment to a particular religion, or a general belief that religion is good for individuals and for the society, or deference to the views of others who are strongly committed to one of these, or some combination of these and other motives.

But whatever the difference between motive and purpose, this is not a distinction relevant to validity under the Spending and Commerce Clauses. The test is neither purpose nor motive, but whether the condition on spending is reasonably related to the spending program and whether the activity regulated or deregulated substantially affects commerce. "The motive *and* purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restrictions and over which the courts are given no control." *United States v. Darby*, 312 U.S. 100, 115 (1941) (emphasis added).

Professor Hamilton's argument about purpose is merely a reprise of her fallacious argument about *Marbury v. Madison*. She says the purpose of RLPA is to achieve results in some cases different from the results that would be achieved in a free exercise claim under *Smith*, and that that is an unconstitutional purpose. But it is not an unconstitutional purpose, for the reasons already stated in response to Question 4.

**9. Professor Hamilton asserts that the RLPA violates Article V's ratification provisions. This would suggest that Congress can do no legislating in constitutional subject matter areas beyond the minimum constitutional requirements. But does that reading not undermine Professor Hamilton's and Professor Eisgruber's allowance that Congress could adopt some religion-protection legislation, just not this? And does not that reasoning also suggest that a whole host of civil rights legislation is constitutionally suspect since protections for many groups under federal legislation goes beyond the mere constitutional requirements?**

Yes to both questions. Professor Hamilton seems to believe that Congress can legislate about constitutional rights in very specific terms, but not in general terms. There is no basis for that distinction, she obviously cites no authority for it, and the courts have never thought that it matters what size bills Congress packages its legislation in. She argues on the same grounds that RFRA is invalid as applied to federal law; as noted in answer to Question 2, two circuits have already rejected that argument.

Professors Eisgruber and Hamilton might also reconcile their positions by arguing that RLPA is not a disguised constitutional amendment if it is proportionate to and congruent with the Supreme Court's understanding of an underlying constitutional right. But as noted in response to Question 2, this depends on the error of transporting the proportionality and congruence test from the Enforcement Clause, where the Court announced it, to the Spending and Commerce Clauses, where the relevant tests are very different and have nothing to do with judicial interpretations of constitutional rights.

**10. The Supreme Court has signaled that it is willing to enforce limits on federal power. But do the *Printz*, *Lopez*, and *New York v. U.S.* cases stand for the proposition that Congress cannot displace or preempt state laws, or lift the burdens of state laws? How does S. 2148 relate to these cases?**

*Printz*, *Lopez*, and *New York* do not stand for the proposition that Congress cannot displace or pre-empt state laws. *Printz* and *New York* expressly reaffirmed Congressional power to pre-empt state laws, even in the absence of direct federal regulation.

[W]here Congress has power to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer states the choice of regulating that activity according to

federal standards or having state law pre-empted by federal regulation.

*New York v. United States*, 505 U.S. 144, 167 (1962). Both *Printz* and *New York* expressly reaffirmed two cases in which Congress used the threat of pre-emption to persuade or coerce the states to enact highly specific regulatory programs. These cases were *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), both described in my written testimony at p.32, and reaffirmed in *New York*, 505 U.S. at 161, and *Printz v. United States*, 117 S.Ct. 2365, 2380 (1997).

The statutes in *Hodel* and *FERC* both went much further than RLPA, because they required specific affirmative regulation. RLPA merely pre-empts regulation with one consequence, and leaves all other choices to the states. *Hodel* said that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining." *Id.* at 290. RLPA would be narrower than that -- a statute limiting state regulation of religion to the extent that it affects commerce or federal spending programs.

As already discussed in response to Question 5, *Lopez* reaffirms the aggregation rule for interstate commerce cases. *Printz* and *New York* reaffirm Congressional power to pre-empt state laws, inconsistent with federal policy, to the extent that such laws are within the reach of Article I powers. These conclusions support the validity of RLPA, and this is the relationship of RLPA to these cases. The claim that these cases would invalidate RLPA depends on a much fuzzier and indefensible connection -- that those cases are concerned with federalism, and that any statute raising federalism concerns is henceforth unconstitutional. That is not what the Court said, and to act on that view would paralyze Congress.

11. Could each of you state your understanding of how S. 2148 accords with the *Seminole Tribe* case regarding state sovereign immunity?

The bill is entirely consistent with *Seminole Tribe*. The Court twice distinguishes and apparently reaffirms *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *Seminole Tribe v. Florida*, 517 U.S. 44, 59, 65-66 (1996). *Fitzpatrick* holds that Congress can override Eleventh Amendment immunity in legislation to enforce the Fourteenth Amendment. Then-Justice Rehnquist's opinion for the Court concluded:

But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456. *Fitzpatrick* was a Title VII suit for retroactive pension benefits to be paid by the state of Connecticut, so the holding unambiguously includes suits on statutory claims if the statute was enacted to enforce the Fourteenth Amendment. Accordingly, the override of Eleventh Amendment immunity can include claims directly under the Free Exercise Clause and also claims under §3 of RLPA, which would be enacted in part to enforce the Free Exercise Clause. Congress has used the *Fitzpatrick* power repeatedly. See especially the Civil Rights Remedies Equalization Act, 42 U.S.C. §2000d-7 (1994), which is the model for the RLPA override.

The line between *Seminole Tribe* and *Fitzpatrick* has generated litigation to determine which statutes were enacted to enforce the Fourteenth Amendment, where Congress can

override immunity, and which were enacted pursuant to other powers, where Congress cannot override immunity. This has led to a flurry of recent decisions upholding the power to override immunity in legislation to enforce the Fourteenth Amendment. See *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998) (Age Discrimination in Employment Act); *Wheeling & Lake Erie Railway v. Public Utility Commission*, 141 F.3d 88 (3d Cir. 1998) (Railroad Revitalization and Regulatory Reform Act); *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998) (Americans with Disabilities Act); *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998) (Age Discrimination in Employment Act and Americans with Disabilities Act); *Oregon Short Line R.R. v. Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998) (Railroad Revitalization and Regulatory Reform Act); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998) (Americans with Disabilities Act), *petition for cert. filed* (No. 97-1941); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997) (Americans with Disabilities Act and Rehabilitation Act), *cert. denied*, 66 U.S.L.W. 3308 (June 22, 1998); *Reynolds v. Alabama Department of Transportation*, 1998 Westlaw 286010 (M.D. Ala. 1998) (disparate impact theory under Civil Rights Act of 1964).

If Congress can override immunity in an act to protect railroads from discriminatory taxation, it can do the same to protect churches and synagogues from discriminatory land use regulation. But the doctrinal point is that the argument in all the cases is over the source of power to enact the substantive legislation. The debate over immunity is derivative from that; none of these cases express the slightest doubt about the continuing validity of *Fitzpatrick*.

Doubts about the override of sovereign immunity depend on the argument that §3 of the bill is substantively unconstitutional to the extent that it attempts to enforce the Fourteenth Amendment, or on a wholly speculative prediction that *Fitzpatrick* might some day be overruled despite its recent reaffirmance.

12. Could each of you explain why the special rules regarding land use are or are not consistent with the *Boerne* decision? If not, what kind of record would be necessary to make it so?

The land use provisions are consistent with *Boerne*. The factual record is adequate. It is up to Congress in the first instance to decide what inferences to draw from the raw facts, and the Committee should state in its report what inferences it has drawn. I believe that the Brigham Young study, the Presbyterian study, and the Gallup Poll data described in my testimony in the Senate, the New York study described in my testimony in last summer's hearing in the Senate, the expert testimony of John Mauck in the House, and the anecdotal evidence of multiple witnesses in both the Senate and the House, are sufficient to support at least the following findings:

a. That land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules.

b. That the standards in individualized land use decisions are often vague and subjective.

c. That rules restricting particular uses to particular zones may be used to entirely exclude religious organizations, or to confine them to areas where little or no land is actually available.

d. That these individualized processes and vague standards provide ample opportunity for any religious bias or hostility to disguise itself in the land use process, facilitating discrimination against religion or among religions.

e. That faiths and denominations with few adherents are discriminated against in the land use process, as shown by their gross over-representation in reported church land use cases.

f. That small and large faiths win their claims at the same rates once they get to court, so that the overrepresentation of small faiths in the reported cases indicates government's discriminatory regulation of these faiths rather than their own propensity to litigate.

g. That serious conflicts between religious organizations and land use authority are many times more common than reported litigation.

h. That the same attitudes and opportunity for discrimination are present in unreported land use conflicts and in reported cases, and it is therefore reasonable to infer that the discrimination documented in the reported cases is equally widespread in the far more numerous unreported conflicts.

i. That these inferences from reported data are reinforced by anecdotal evidence of discrimination, and that these anecdotes come from all across the country.

j. That these anecdotes show not just that religious institutions are often burdened, but that more popular churches, better connected churches, and older churches are often treated better than less popular, less connected, and newer churches.

k. That there is no majority religion in the United States, and that adherents of different faiths are distributed quite unevenly across the nation, so that every faith is a small faith somewhere in the country.

l. That in some cases, religious discrimination is joined with and reinforced by racial and ethnic discrimination.

m. That in a significant number of communities, it is difficult or impossible to build, buy, or rent space for a new church, whether large or small.

n. That the problem is most severe with respect to small faiths, but it is not confined to them, and large, mainstream churches also sometimes encounter land use decisions that appear to have been influenced by hostility to the presence of a church.

o. That in approximately half the cities and towns in America, it is illegal to start a church anywhere in the community without a special use permit or similar discretionary permission from a land use authority.

p. That churches are many times more likely to be landmarked than any other kind of property.

q. That some communities have land use rules that on their face discriminate against churches.

r. That 45% of Americans have "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% have mostly or very unfavorable opinions of "members of religious cults or sects."

s. That these data on views about "fundamentalists," "cults," and "sects" indicate widespread hostility to persons whose religious beliefs are unusual or significantly more intense than the norm.

t. That governmental officials, including land use officials, respond to this hostility as they respond to any widespread view among their constituents, and that some land use officials probably hold such views themselves.

u. That this hostility can readily influence land use decisions about religious organizations, because of the individualized processes and vague standards.

v. That even in the absence of discrimination, land use regulation has a disproportionate impact on religious

organizations, because they are not-for-profit organizations, often operating on limited operational budgets and with little or no capital, and buildings designed for religious use are often difficult or impossible to convert to other uses.

w. That zoning litigation is very expensive, not only because of the cost of litigation, but also because it is often necessary to pay for the land and hold the land throughout the litigation, without knowing whether it will ever be possible to use the land.

x. It is difficult to prove discrimination in any one land use proceeding, because the applicable standards are vague, the focus is on the single parcel of land, land use agencies discourage or refuse to hear evidence about other comparable parcels, and the national pattern of discrimination is not readily apparent until large numbers of cases are examined.

If Congress makes these findings, or several of them, it will have found a pattern of discrimination sufficient to support remedial legislation to enforce the Fourteenth Amendment. It is not necessary to find that every church land use regulation is unconstitutional; no one claims that. It is not necessary for Congress to try all the cases and determine that any particular percentage of church land use regulations is in fact unconstitutional. Rather, *Boerne* says the standard is "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997). Surely the findings outlined above show "reason to believe" that "many" applications of land use regulations to religious organizations "have a significant likelihood" of being unconstitutional.

At another point in the opinion, *Boerne* says that "If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive." *Boerne*, 117 S.Ct. at 2171.

The Brigham Young study alone shows disparate impact against small faiths. And it shows disparate impact in a context where the connection to motive is strongest -- not in a single statute that might have been enacted for good reasons despite its disparate impact, but in a series of individualized decisions over a large number of cases where other legitimate reasons might be expected to balance out.

If the Committee finds discrimination in the land use process, the land use provisions of RLPA will be a remedy proportionate and congruent to the problem. RLPA provides reasonably objective rules and a discrete range of verifiable reasons for refusing religious land use needs. It puts the burden of persuasion on land use authorities instead of on the religious organizations. These provisions accommodate legitimate reasons for land use regulation while making it much harder to refuse permits for vague reasons that disguise hostility to religion in general or minority religions or a particular disliked religion.

RLPA would protect all religions, although the evidence shows that the problem is most severe with respect to newer and smaller religions. This does not make RLPA a disproportionate response, for at least two reasons. First, Congress could not pass a law protecting some religions and not others. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (striking down a law that distinguished religions on the basis of the source of their contributions). The only way for Congress to protect the smallest religions is to protect all religions.

Second, the standard pattern of discrimination laws is to protect against discrimination in a whole category, even though it is rarely the case that every subgroup within a category is discriminated against, and never the case that every subgroups is discriminated against equally. The most severe problem of racial discrimination was against African-Americans. Congress heard much less evidence of discrimination against Asians, and

little or no evidence of discrimination against whites. Congress heard much more evidence of discrimination against women than of discrimination against men. There are scores of national origins about which Congress heard no evidence of discrimination. Yet Congress protected all races, both sexes, and all national origins.

The land use provisions of RLPA are drafted on the same principle. If Congress were simply to enact a general provision prohibiting discrimination, it obviously would protect all religions and not just those that have suffered the most discrimination. But a general prohibition on discrimination would be as difficult to enforce as the existing general prohibition in the Free Exercise Clause. RLPA proposes more specific prophylactic rules to make the constitutional rule against discrimination enforceable, but the principal is the same: these rules should protect all religions, and not just those that have suffered the most.

**13. Both Professors Hamilton and Eisgruber suggest that somehow targeted exemptions for particular religions in particular situations would somehow be more appropriate than a general accommodation of religion across the board. It seems to me that such an individualized approach to religious accommodation is the worst possible option. Religions with enough political influence may succeed in obtaining religious accommodations, but unpopular minority religions are unlikely to be successful. Isn't approaching the issue of religious accommodation on a statute-by-statute basis, rather than through a general rule, much more likely to have the effect of discriminating between religions and thereby exacerbating rather than minimizing Establishment Clause concerns? Would not such targeted accommodations be more suspect under *Board of Education v. Grumet* and *Estate of Thornton v. Calder* than a general non-discriminatory accommodation rule?**

Yes and yes. This analysis is exactly correct. The religious practices of individuals, unorganized groups, unaffiliated churches, and small denominations -- any group too small to maintain a presence in Washington or their state capital -- would rarely if ever be protected. The practices of religious groups that eschew political activity would rarely if ever be protected. Religious practices that make unattractive soundbites would rarely if ever be protected. Unpopular or threatening religious groups would rarely if ever be protected. The religious discrimination that has been shown to operate in the land use regulation process can certainly operate in other political processes.

Congress is expert in the political process; it does not need testimony to find that this is how individualized exemptions would work. Justice Scalia predicted in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), that small faiths would be victimized. In their amicus brief in *Boerne*, members of the Virginia legislature explained why they were incapable of making sensible decisions about individualized requests for religious exemptions, and how RFRA supported and enhanced their legislative process. 1997 Westlaw 10275.

Such an inherently discriminatory process of enacting religious exemptions would often have unconstitutional consequences. This is the lesson of *Grumet* and especially of *Thornton*. *Grumet* holds that a particular protection for a single faith group is unconstitutional, even if that group appears to be uniquely situated for the present. But *Grumet* reaffirms legislative power to enact general laws that lift regulatory burdens from religious exercise. *Board of Education v. Grumet*, 512 U.S. 687, 705 (1994). A general protection for all religious practices burdened in the workplace is better, in Establishment Clause terms, than a particular protection for observing the Sabbath. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); see especially *id.* at 712 (O'Connor, J., concurring). Legislative accommodations for particular religious practices always run the risk of violating the rule against denominational preference.

*Larson v. Valente*, 456 U.S. 228, 244 (1982), quoted in response to Question 12. RLPA's across the board enactment of a universally applicable standard for all cases within the reach of Congressional power serves the highest Establishment Clause values. Professors Eisgruber's and Hamilton's preference for specific exemptions is an invitation to unconstitutionality.

**14. Is there any case-law support for the proposition that Congress can require religious accommodation statute-by-statute (for example by granting religious exemptions from Title VII or exempting Christian Scientists from Medicare/Medicaid) but cannot establish a general rule of religious accommodation without creating an establishment of religion? Is there case-law support for the opposite conclusion?**

There is no case-law support for the proposition that Congress can require exemptions statute by statute but not generally. Nor is there case law support for an unqualified statement of the opposite conclusion -- some accommodations in specific statutes for specific religious practices have been upheld. The leading case upheld such a statute. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), upheld an exemption authorizing religious organizations to hire members of their own faith to do the organization's work.

Exemptions come in a continuum from broad to narrow, and there is case-law support for the proposition that narrow exemptions are more problematic than broad exemptions, and more likely to be unconstitutional. The leading Supreme Court cases are cited in response to Question 13. You mention another example in this Question. The provision for paying Medicare and Medicaid benefits for qualifying expenses in Christian Science nursing homes was struck down as a denominational preference. *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996). But a similar provision was re-enacted in general terms. Pub. L. 105-33 §4454 (1997), principally codified at 42 U.S.C.A.

§1395x(ss)(1) (Supp. 1998). I expect the new law to be upheld; certainly it is not invalid as a denominational preference, and it will be far easier to defend than the previous, less general law. (Note too that this Establishment Clause dispute has nothing to do with the free exercise dispute over medical care for children.)

15. Professor Hamilton asserts that religious accommodation "is a zero-sum game" in that by protecting religious practice from general laws, Congress "inevitably subtracts from the liberty accorded other social interests." [Hamilton Statement, p.4] If this is true, is all accommodation invalid under the Constitution? What about legislative accommodations that have been upheld, or state constitutions or enactments that are more protective of religious free exercise: are they also unconstitutional?

First of all, the claim is not true. Religious exemptions are sometimes a zero-sum game, but usually they are not. The cost of a burden on the right to exercise one's religion is usually concentrated, personal, and intense; the cost of permitting someone else's religious exercise is usually diffuse, general, and mild. In such cases, the gains to the person exercising his religion far exceed the costs to anyone else. Where this is not true -- where a proposed exercise of religion imposes concentrated costs on others -- the compelling interest test will usually be met. The right to exercise one's religion does not include the right to have anyone else pay for it.

The costs to others most commonly asserted are external preferences -- minding someone else's business in plain language -- or envy at what is conceived of as special privilege, or inherent in the exercise of religion, or more than one of these. Consider *Goldman v. Weinberger*, 475 U.S. 503 (1986), where Captain Goldman sought the right to wear a yarmulke with his Air Force uniform. Maybe some members of the Air Force had a genuine aesthetic preference that he not do so. But their interest in what goes on his head can never be equal to his interest in what goes on his head; their desire to see his hair or

bald spot will never be as weighty as his belief that he is obliged to cover his head before an omnipresent God. This is the problem of the external preference.

Conceivably, some members of the Air Force might have resented Captain Goldman's yarmulke as a special privilege not available to them -- because they had no comparable need for a non-uniform addition to their uniform. This is the problem of envy, and again, it cannot equal Captain Goldman's deeply held belief.

Moreover, each of these costs is inherent in free exercise; each of these costs were known to the Founders when they adopted a Free Exercise Clause. The Founders may or may not have known about yarmulkes, but they certainly knew that Quakers refused to remove their hats to any man. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1471-72 & n.320 (1990). The Founders undoubtedly knew that religious services attracted crowds, and that crowds sometimes make noise and impede the passage of other persons. To say that every incidental cost of religious exercise is equal to the benefits is to say there should be no right to exercise religion, which indeed seems to be Professor Hamilton's position. But Congress does not have to accept that position.

In the House Hearing on June 16, Mr. Canady asked whether Congress could protect a female student in a federally assisted high school who believed that gym shorts violated her religious teachings against modest dress. Professor Hamilton said Congress could do nothing, and she continued to insist that every case of religious exemptions is a zero-sum game. Mr. Canady's question shows the absurdity of this position. If the hypothetical female student wears sweat pants instead of gym shorts, no one else is affected in the slightest.

If it were true that all religious exemptions imposed costs equal to their benefits, the constitutionality of religious

exemptions would be a very much harder issue. Exemptions would still be valid when the costs of denying exemptions were concentrated and the costs of granting exemptions were diffuse but equal if cumulated. Costs that were equal in amount and distribution would make religious exemptions a dubious policy and probably unconstitutional.

But as your question implies, it is obvious that the Supreme Court does not view the matter so. It has upheld religious exemptions in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). It has invited them in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), and *Board of Education v. Grumet*, 512 U.S. 687, 705 (1994). Professors Eisgruber and Hamilton seem to concede the validity of specific exemptions in state and federal law and of state constitutions interpreted to mean something like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), instead of something like *Smith*. All of these exemptions would be unconstitutional if exemptions were really zero-sum games, and if that characteristic made them unconstitutional.

There is another and independent reason why RLPA would not create a zero-sum game. Often these cases settle, because serious negotiations reveal a way to eliminate all or most of the burden on religion while achieving all or most of the government's interest. Negotiations often lead to win-win solutions. But those negotiations need never begin if one side is entitled to ignore the other's needs. If the government can simply say that its policy is no exceptions, and no law requires it to consider exceptions, it can simply ignore religious needs, and religious claimants have no way to force negotiations to even open. RLPA would empower negotiations, because it would give reasonable leverage to each side. The religious claimant would have a viable legal claim; government would have a viable defense; and both sides would find it in their interest to talk.

**16. Professor Eisgruber, you suggest that there are more appropriate methods of protecting religious liberty than RLPA. What are they, and why are they not more objectionable under your analysis than RLPA?**

Consider Professor Eisgruber's answer carefully. If he proposes specific exemptions, that proposal will indeed be more objectionable than RLPA.

I expect that instead he will propose a general provision like RLPA, with a much lower standard of justification for governmentally imposed burdens, such as a reasonable accommodation standard or possibly an intermediate scrutiny standard. This change would do nothing to cure his objections about the misuse of Article I powers. And it does nothing to cure his Establishment Clause objection if he states that objection, as he sometimes does, as creating two classes of citizens, the religious and the nonreligious.

A lower standard of justification might ameliorate his Establishment Clause objection if he states it in less categorical terms, because it might reduce the magnitude of what, in his view, is a preference of religious commitments over other commitments. But that preference is inherent in the Free Exercise Clause, even under the Supreme Court's interpretation. Professor Eisgruber talks about professional commitments, family commitments, creative and artistic and others. Some of these are protected under the Free Speech Clause or under the implied protection for family, sexual, and reproductive matters; any of these could be protected by statutes similar to RLPA if Congress thought such protection necessary. But many of these do not receive judicial protection even comparable to that in *Employment Division v. Smith*. Professional commitments certainly, and family commitments often, are not protected even against discrimination or laws that are not neutral and generally applicable laws. His standard of equal constitutional and statutory protection for all important human commitments is not the law under any interpretation of the Free Exercise Clause.

, 17. S. 2148 includes a new definition of "religious exercise" making clear that a particular action need not be "compulsory or central to" a claimant's theology to avoid having judges make theological determinations. Could each of you explain why the new definition is or is not appropriate or constitutional?

The definition is entirely appropriate and constitutional. It is based on the legislative history of RFRA, and it is necessary to avoid judicial decisions under RFRA that disregarded that legislative history and read requirements of compulsion and centrality into the Act.

The decisions that most thoroughly examined RFRA's legislative history and pre-RFRA precedent all concluded that Congress intended to protect conduct that was religiously motivated, whether or not that conduct was compelled. *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-47 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997); *Muslim v. Frame*, 891 F. Supp. 226, 229-31 (E.D. Pa. 1995), *rehearing denied*, 897 F. Supp. 216, 217-20 (E.D. Pa. 1995), *aff'd mem., possibly on other grounds*, 107 F.3d 7 (3d Cir. 1997); *see also Mack v. O'Leary*, 80 F.3d 1175, 178-80 (7th Cir. 1996), *vacated on other grounds*, 118 S.Ct. 36 (1997). But this issue had to be litigated repeatedly, and some courts erroneously concluded that only compulsory religious observances were protected. *See, e.g., Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995).

Similarly, Congress nowhere expressed any intention to confine the protection of RFRA to practices that were "central" to a religion. This concept did not appear either in statutory text or legislative history; it was read into the statute by some courts after RFRA's enactment. Other courts rejected or ignored this misinterpretation; the most extensive opinion concluded that Congress did not intend such a requirement, that pre-RFRA cases did not contain it, and that courts could not resolve disputes about the centrality of religious practices. *Muslim v.*

*Frame*, 891 F. Supp. 226, 230-31 (E.D. Pa. 1995), *aff'd mem.*, possibly on other grounds, 107 F.3d 7 (1997). The definition of religious exercise in RLPA would clarify both these points.

Professor Eisgruber has at times suggested that the definition is "novel and unprecedented," but that is incorrect. Both sides have understood the debate over *Employment Division v. Smith* as a debate over protection for religiously motivated conduct. The Supreme Court's cases have not distinguished religiously compelled conduct from religiously motivated conduct. The Congressional Reference Service marshalled these opinions for the RFRA hearings, noting that the Court has often referred to protection for religiously motivated conduct. Letter from the American Law Division of the Congressional Research Service to Hon. Stephen J. Solarz (June 11, 1992), in *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 131, 131-33 (1992). Since that compilation, justices on both sides of the issue have treated the debate as one over protection for religious motivation, not compulsion. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2173 (Scalia, J., concurring) ("religiously motivated conduct"); *id.* at 2174 (same); *id.* at 2177 (O'Connor, J., concurring) (same); *id.* at 2178 (same); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 ("conduct motivated by religious beliefs"); *id.* at 533 ("religious motivation"); *id.* at 538 (same); *id.* at 543 ("conduct with religious motivation"); *id.* at 545 ("conduct motivated by religious belief"); *id.* at 546 ("conduct with a religious motivation"); *id.* at 547 ("conduct motivated by religious conviction"); *id.* at 560 n.1 (Souter, J., concurring) ("conduct motivated by religious belief"); *id.* at 563 ("religiously motivated conduct"); *id.* ("conduct . . . undertaken for religious reasons") (quoting *Employment Division v. Smith*, 494 U.S. at 532); *id.* at 578 (Blackmun, J., concurring) ("religiously motivated practice").

A requirement of religious compulsion would exclude much conduct that is obviously religious. Courts that have assumed that only the free exercise of religion is confined to religiously compelled conduct have concluded that meeting for prayer is not the exercise of religion, *Brandon v. Board of Education*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), and that becoming a minister is not the exercise of religion. *Witters v. State Commission for the Blind*, 771 P.2d 1119, 1123 (Wash.), *cert. denied*, 493 U.S. 850 (1989). Religious compulsion is a fundamentally flawed concept of religious liberty, and the definition should negate it.

A centrality requirement would be no better. Indeed, insistence on a centrality requirement is an attempt to insert a time bomb that might destroy the statute, for the Supreme Court has repeatedly stated that courts cannot hold some religious practices to be central and protected, while holding other religious practices noncentral and not protected. *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1985). The Court in *Smith* unanimously rejected a centrality requirement. 494 U.S. at 886-87 (opinion of the Court); *id.* at 906-07 (O'Connor, J., concurring); *id.* at 919 (Blackmun, J., dissenting). The Court's disagreement over whether regulatory exemptions are constitutionally required does not depend on any disagreement about a centrality requirement.

In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that "the less central an observance is to the religion in question the less the officials must do" to avoid burdening it. *Mack v. O'Leary*, 80 F.3d 1175, 1180 (1996), *vacated on other grounds*, 118 S.Ct. 36 (1997). The concurring and dissenting opinions in *Smith* imply a similar view; see the passages cited in the previous paragraph. But this balancing at the margins in individual cases is a very different thing from a threshold requirement of centrality, in which all religious practices are divided into two categories and cases are dismissed as a matter of law if the judge finds, rightly

or wrongly, that a practice falls in the noncentral category. Such an either-or threshold requirement greatly multiplies the consequences of the inevitable judicial errors in assessing the importance of religious practices. RLPA properly disavows any such interpretation.

**18. Is there anything raised by the hearing or the legislation that you would like to further comment on or submit to supplement any of your statements or answers?**

I think the more specific questions have covered everything. And if not, I am too exhausted to figure out what you missed.

#### **Questions from Senator Thurmond**

**1. Some have argued that the purpose of the Religious Freedom Restoration Act was to return to the strict scrutiny standard that the Supreme Court had applied to the Free Exercise Clause before *Employment Division v. Smith*, 494 U.S. 872 (1990). This appears to be true as a general rule.**

**A. However, it does not appear to be true as to prisoners, whose constitutional rights could be interfered with if the interference was "reasonably related to legitimate penological objectives," based on *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Do you agree?**

The Senator is correct. RFRA restored the strict scrutiny standard that the Court had applied under *Sherbert v. Verner*, 398 U.S. 403 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court had created a lower standard for prisoners in *O'Lone*, three years before it created a still lower standard for the free population in *Smith*. RFRA attempted to restore the standard of *Sherbert* and *Yoder*, not the dual standards that prevailed between *O'Lone* and *Smith*.

The facts of *O'Lone* illustrate the dangers of its excessively deferential standard. Plaintiffs in *O'Lone* were prevented from attending the central Muslim worship service, because prison authorities assigned them to work outside the main building at the time the service was conducted. The right of Muslims to worship appears to have been at the mercy of those officials with discretionary authority over work assignments. The case involved open discrimination against Muslims, whose Sabbath is on Friday; there were many fewer outside work crews on Saturday and Sunday, when Christians and Jews conduct their worship services. *Shabazz v. O'Lone*, 595 F. Supp. 928, 932 (D.N.J. 1984).

**B. Before *O'Lone* and *Turner v. Safley*, 482 U.S. 78 (1987), did most circuit courts of appeals apply a standard for prisoners similar to the *O'Lone* standard?**

No. I am not an expert on the prison cases of that era, but I believe that most circuits applied a high level of scrutiny that took account of the prison context and the overriding importance of safety and security. See *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985); *Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. en banc 1986), *rev'd*, 482 U.S. 342 (1987); *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir. 1980); *Safley v. Turner*, 777 F.2d 1307 (8th Cir. 1985), *rev'd*, 482 U.S. 78 (1987); *Weaver v. Jago*, 675 F.2d 116 (6th Cir. 1982). Note that both *O'Lone* and *Turner* reversed decisions below that had applied considerably higher levels of scrutiny.

**C. Are you aware of other situations in the application of the Free Exercise Clause where strict scrutiny was not the standard before *Smith*, other than the prison context?**

Strict scrutiny was not the standard in cases involving the military. *Goldman v. Weinberger*, 475 U.S. 503 (1986). And strict scrutiny was not the standard in cases involving the government's management of its own property or internal

operations, which imposed no cognizable burden on religious liberty. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

**D. After *Smith*, are there still some situations where strict scrutiny is still the standard? Please explain.**

Yes. But the boundaries of these situations are unclear, and the cases are very difficult to litigate. Strict scrutiny is still the standard whenever laws that burden religion are not neutral and generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court says that strict scrutiny is still the standard when plaintiff asserts a free exercise right in combination with some other constitutional right. These are known as hybrid claims; the Court avoided overruling *Wisconsin v. Yoder* by saying that Yoder asserted a hybrid claim of free exercise and the parental right to control the education of their children. *Smith*, 494 U.S. at 881-82.

2. The dissent in *O'Lone* argued that the proper standard for the analysis of prisoner claims under the Free Exercise Clause should be intermediate level scrutiny, i.e., that restrictions should be upheld if they "are necessary to further an important governmental interest . . . and are no greater than necessary to achieve prison objectives." Do you believe that this standard would be sufficient for the courts to protect the ability of prisoners to properly exercise their religion? Do you believe it would be too burdensome on prison administrators for security and safety?

This language would not be too burdensome on prison administrators for security and safety. And if it were taken seriously, it would provide sufficient protection for prisoners. The suggested change would be irrelevant to "security and safety," both of which are clearly compelling. Indeed, I am not sure what interests there are in the prison context that would be "important" but not "compelling," particularly in light of the

legislative history of RFRA, which indicates that allegedly compelling interests must be assessed in light of the prison context. Genuine safety and security interests clearly satisfy either standard.

The danger of course is that "important" would be watered down to something like "legitimate" or "not frivolous." Perhaps this result would be rationalized as assessing "importance" in the prison context. This change is not necessary to protect the interest in safe and secure prisons. As Attorney General Reno predicted when RFRA was enacted, "the strong interest that prison administrators and society in general have in preserving security, order, and discipline in prison will receive great weight in the determination whether the government meets the compelling interest test," and that prison administrators would retain authority "to regulate the time, place, and manner of an inmate's exercise of religion." 139 Cong. Rec. H2358-59 (May 11, 1993).

This was clearly Congress's intention. The Senate Report dealt with the issue explicitly:

The committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears,

or post-hoc rationalizations will not suffice to meet the act's requirements. . . .

The act would return to a standard that was employed without hardship to the prisons in several circuits prior to the *O'Lone* decision. The standard proved workable and struck a proper balance between one of the most cherished freedoms secured by the first amendment and the compelling governmental interest in orderly and safe operation of prisons.

Sen. Rep. 103-111, Religious Freedom Restoration Act of 1993, at 10-11.

The Attorney General's prediction and the Senate's intent have been vindicated. There is no record of prison authorities having lost a case they should have won under RFRA; in fact, they lost very few cases at all. Data on reported RFRA cases is now published in Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right--Reflections on City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 793, 802-03 (1998). As the title indicates, this does not come from a RFRA supporter.

In 94 reported prisoner RFRA cases in federal court, courts granted relief 9 times and denied relief 85 times. In five reported prisoner RFRA cases in state court, courts denied relief all five times. In state and federal courts combined, there were 99 reported prisoner RFRA claims, with relief granted 9 times (9%) and denied 90 times (91%). I think that there is no need to further reduce the standard for prison cases.

Nor is it necessary to reduce the level of protection for prisoners because of frivolous prisoner litigation. For consideration of this issue, see my response to Question 2 from Senator DeWine.

3. In applying the Religious Freedom Restoration Act, it appears that some courts required prisoners to show that the requests they made were based on a central tenet of the person's religion, see *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995), while other courts only required that the requests be based on a central tenet of a prisoner's sincerely held individual beliefs, see *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995).

A. Do you agree that courts have made this distinction?

No. Both *Bryant* and *Werner* explicitly confined the Act to religious beliefs. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir.), *cert. denied*, 515 U.S. 1183 (1995). I am not aware of any decision under RFRA that protected "sincerely held individual beliefs" that were not part "of the person's religion."

The disagreement between *Bryant* and *Werner* is different. *Bryant* held that a Pentecostal plaintiff must "show that the activities which he wishes to engage in are *mandated* by the Pentecostal religion." 46 F.3d at 949 (emphasis added). *Werner* did not require that the religious belief be mandated by some larger or higher human authority; it was enough that government had substantially burdened "the exercise or expression of his or her own deeply held faith." 49 F.3d at 1479 n.1, citing *Thomas v. Review Board*, 450 U.S. 707 (1981).

The courts disagreed first over the issue raised by Question 17 from Senator Hatch: the *Bryant* court erroneously thought that only compulsory or mandatory religious exercises were protected. Second, the *Bryant* court erroneously assumed that this mandate must come from some human authority, such as a denomination. The *Werner* court correctly recognized that religious belief might motivate behavior without compelling that behavior, and that one might believe that his religious guidance comes directly from God, instead of or in addition to an

intermediate human authority such as a church or denomination. The view of the *Bryant* court on these issues is inconsistent with Supreme Court precedent, with the whole American legal and political tradition of *individual* rights, and with the widespread religious emphasis (especially in Protestantism) on individual conscience and a personal relationship with God or Christ. Obviously the bill cannot incorporate or endorse Protestant theology, and other important religious traditions put much more emphasis on religious law or on the teaching authority of the hierarchical church. But it would be self-defeating for a religious liberty bill to exclude from its protections a central tenet of the largest religious tradition in the country. And to do so would discriminate among religious beliefs, thus raising serious doubts about the constitutionality of the bill. See the discussion of *Larson v. Valente*, 456 U.S. 228 (1982) in response to Questions 12 and 13 from Senator Hatch.

**B. Does the Religious Liberty Protection Act clarify this distinction, and if so how?**

The bill expressly rejects *Bryant's* requirement of religious compulsion. The bill also explicitly rejects any requirement that the religious exercise be central to "a larger system of religious belief." See my answer to Question 17 from Senator Hatch.

I think that the bill implicitly rejects any requirement of a "larger system of religious belief." It assumes the correctness of, and certainly does not modify, *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), and *Thomas v. Review Board*, 450 U.S. 707 (1981), both of which protect religious beliefs that are sincerely held by an individual, whether or not they are taught by a church or denomination.

**C. Does the Religious Liberty Protection Act require that the tenet be central to the religion (regardless of whether the tenet is objective, *i.e.*, based on an objectively identifiable tenet of a religion, or subjective, *i.e.*, based on an**

**individual's belief that a particular tenet exists) for strict scrutiny to apply?**

No. The proposed definition of "religious exercise" rejects a centrality requirement. See my response to Question 17 from Senator Hatch.

**D. If the test under the Religious Liberty Protection Act is only whether the tenet is based on a sincerely held belief of an individual, it appears that the court would almost always have to make a credibility determination of whether the belief was sincere. Would this essentially prevent the courts from granting summary judgment in any such case?**

No. Of course it would be rarely be possible to grant summary judgment on the ground of insincerity. But the presence of an issue with respect to sincerity would not preclude summary judgment on any other ground, such as compelling interest, lack of substantial burden, ripeness, mootness, statute of limitations, or other remedial or procedural grounds.

I would add that in my experience, there are few genuine or difficult sincerity issues. In a few cases, the claim appears to be obviously insincere on its face; in most, the asserted belief is undoubtedly religious and there is nothing to suggest any lack of sincerity.

**4. How do courts define a "religion" for purposes of receiving protection under strict scrutiny? In other words, can a religion be the beliefs of one person and receive protection under the Religious Freedom Restoration Act or must it be established or exist in some objective manner beyond the claim of one individual?**

The sincere religious belief of one person is protected, for the reasons stated in response to Questions 3.A. and 3.B. I would add that if the beliefs of one person cannot be a religion,

no new religion could ever start. Great religions have been founded on the belief that God spoke first to one person -- to Moses, to Jesus, or to Mohammed. Martin Luther, John Calvin, Roger Williams, and Joseph Smith each had a new religious insight or revelation; at the beginning, their teachings were just "the claim of one individual." These examples are well known because in each case, the one person sought to teach or persuade others, and their beliefs eventually came to be accepted by millions. But the one person who persuades others, and the one person who seeks to live a life of faith without persuading others, are equally protected.

### Questions from Senator Grassley

**1. Right now, it's still an open question as to whether the original Religious Freedom Restoration Act is constitutional as applied to the federal government. Do any of you have any thoughts on how the courts are likely to decide this question?**

Two courts of appeals have upheld RFRA as applied to federal law. *In re Young*, 141 F.3d 854 (8th Cir. 1998), *petition for cert. filed*, (No. 97-1744); *EEOC v. Catholic University*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). Neither court found the issue difficult. *In re Young* is now controlled by the Religious Liberty and Charitable Donation Protection Act, so it is almost inevitable that the petition for certiorari will be denied.

The opinion in *In re Young* is entirely persuasive. It is almost unimaginable that Congress does not have power to limit the reach of statutes that it enacted, and which it could amend or repeal at any time.

Professor Hamilton's contrary opinion is based on her view that Congress can protect religious liberty in many separate statutes but not in one general statute. As more fully stated in my response to Question 9 from Senator Hatch, there is

absolutely no basis for this theory. If the courts tried to control the drafting of legislation in this way, there really would be a separation of powers problem. And as more fully stated in Questions 13 and 14 from Senator Hatch, and in my responses to those questions, specific legislation would raise Establishment Clause problems that are avoided by RFRA's even-handed generality.

2. The current proposal which Senator Hatch and Senator Kennedy have introduced prohibits the recipients of "federal financial assistance" from substantially burdening "a person's religious practice." I have a few questions about this:

A. What does the phrase "federal financial assistance" mean? Is the phrase intended to cover indirect financial assistance where no money changes hands, but where the federal government provides favorable tax treatment? Let me give you an example. Earnings from municipal bonds are tax free under the tax code, meaning that municipal units of government get a financial benefit in the bond market that other bond-issuers do not get. Does the favorable tax treatment of municipal bonds constitute "federal financial assistance" within the meaning of S. 2148 such that the bond-issuer's actions are subject to the restrictions listed in S. 2148?

This issue would presumably be controlled by many years of accumulated administrative practice and case law under Title VI and similar Spending Clause statutes. RLPA breaks no new ground here, and statutory silence would be taken as acquiescence in the existing rules.

I am not an expert on that body of law, but my impression is that Spending Clause legislation is triggered by direct financial assistance. I do not recall ever reading a case involving indirect financial assistance. The cases frequently talk about the assisted program or activity receiving federal funds.

And in a brief bit of research, certainly not exhaustive, I found no case even raising the issue of whether indirect financial assistance triggered liabilities under Spending Clause statutes.

I find it almost unimaginable that the tax exemption for municipal bond interest would trigger RLPA. It is essential to Spending Clause legislation that state and local governments have a choice of accepting the assistance with the condition, or of rejecting the condition and also the assistance. I do not know if it is even possible for state and local governments to issue taxable general obligation bonds. If a city borrows money, and the bonds qualify for exemptions, it is the bondholders and not the city that choose to claim the exemption. If the city cannot refuse the indirect assistance, it is completely outside the rationale for Spending Clause conditions.

**B. What does the term "person" mean? Is it meant to cover corporations and other entities which are deemed "persons" under the law? If so, why do we want to provide extra religious freedoms to corporations?**

"Person" is defined in 1 U.S.C. §1 (1994). It does include corporations and other entities.

Churches, synagogues, other religious organizations, and their affiliates are entities with a legal existence. Many of them are incorporated. Others are organized as trusts, corporations sole, unincorporated associations, and sometimes in other ways. An inclusive definition of "person" is essential to the purpose of the bill.

**C. S. 2148 says that recipients of federal financial assistance can't substantially burden religious practice. Can any of you give examples of non-substantial burdens on religious practice which wouldn't violate S. 2148?**

A burden is substantial if it prohibits or prevents an exercise of religion or if it imposes a substantial cost on an

exercise of religion. Conversely, a burden is insubstantial if it permits the religious exercise to continue and imposes only an insubstantial cost. "Substantial" modifies "burden;" it does not modify "religious exercise." It therefore misreads the statute for the courts to hold, as a threshold matter, that the religious exercise at issue is not substantial, or not a substantial part of the claimant's religion, and that a burdened religious exercise is therefore wholly unprotected by the bill. The bill attempts to correct this misinterpretation in its definition of "religious exercise." See my response to Question 17 from Senator Hatch.

Many laws regulating behavior without religious significance for the claimant may have indirect consequences for his claimant's religious behavior. If he did not have to pay taxes, or if his occupation were not regulated, he could give more money to his church, or spend more time at church. But the cost of giving to his church or going to his church has not changed; if there is a burden here, it is not substantial.

I was not present when "substantial" was added to RFRA, but I know that it happened shortly after Laurence Tribe raised the possibility that a driver, stopped for running a red light on his way to church, might claim that he was late and that the red light burdened his right to worship. No one ever intended to authorize such a claim, and the requirement of a "substantial" burden was a way to eliminate it. "Substantial" may also have been added with a view to frivolous prisoner claims, where the principal burden is the legitimate fact of imprisonment and not the challenged detail of the prison's policy.

In the real world, at least outside prisons, plaintiffs rarely sue when their religious practice is permitted to continue with only an insubstantial increase in cost. The burdens that people allege seem substantial to them; otherwise, most of them would not take on the substantial burden of filing a lawsuit. So in the cases that actually get litigated, most burdens are substantial, and cases holding otherwise frequently misinterpreted RFRA.

**D. S. 2148 says that a policy can be considered to burden religious practice even if the policy is a generally-applicable policy. I have a question about policies of general applicability and the substantial burden test I referred to in the last question. Can there really ever be an inadvertent substantial burden on religious freedom?**

Yes. Consider an example familiar to the Senator -- suits by trustees in bankruptcy to make churches pay the creditors of a bankrupt member an amount equal to any contributions the member had made in the last year, or the last four years, before the member's bankruptcy. These suits were a huge burden on the religious liberty of churches. But they were certainly inadvertent from the perspective of Congress, which never intended to authorize any such thing. The Senator successfully sponsored legislation to solve this problem.

Even if the law is not misinterpreted, a legislature or agency can inadvertently burden a religious practice that it is not familiar with. When state and federal officials listed peyote on the schedule of prohibited drugs, it is quite unlikely they were thinking of the peyote religion of American Indians, or even that they knew about it. They criminalized a worship service, certainly a substantial burden, but the law was generally applicable and the burden was inadvertent.

When the authorities persist in enforcing such a law after the religious practice is called to their attention, it is obviously harder to describe the burden as inadvertent. Sometimes they persist out of a hostile indifference to religion or to the particular religious practice; sometimes they genuinely believe that any exception would threaten a compelling interest, or that they have no authority to permit an exception.

Let me say also that I am not sure why it matters whether substantial burdens are advertent or inadvertent. The standard of *Employment Division v. Smith* is "neutral and generally applicable," not inadvertent. The bill references

general applicability to make clear that it is rejecting, and not incorporating, the *Smith* test. Neutral and generally applicable laws that substantially burden religion would require justification under RLPA but not under the Free Exercise Clause. But it will not matter under either source of law (except possibly as evidence of motive) whether the burden was inadvertent.

#### Questions from Senator DeWine

1. In your opinion, how would the Religious Liberty Protection Act (RLPA) affect health and safety laws that conflict with religious practices or beliefs in which parents fail to seek medical treatment for their children? Even if such health and safety laws protecting children meet the "compelling interest" test, how could the "least restrictive means" requirement affect current laws? Please use examples to support your explanation.

I believe that the health and safety of children is a compelling governmental interest, and I have absolutely no doubt that courts will so hold. The cases that actually get litigated typically involve life threatening illnesses with a known medical treatment. The courts cannot decide whether religious treatment will work; that necessarily remains an unknown from the court's perspective. But courts can assess the chances that the medical treatment will work, and they will readily find a compelling interest in making available to the child a treatment known to be effective.

The least-restrictive-means test requires government to use alternate means that achieve the compelling interest with less burden on religious exercise. It does not require government to leave its compelling interest unachieved. Less effective remedies, or threatened penalties with less deterrent effect, are not a less restrictive means of achieving the compelling interest. Nothing in the bill will reduce protection for the children in these cases.

At the hearing on June 23, Professor McConnell suggested a genuine less restrictive means that might in fact provide *more* protection for the children. He said that it should be sufficient for the parents to notify the child welfare authorities that their child was seriously ill, and let the government decide whether it was necessary to get medical attention for the child. If in fact there are parents who are unwilling to seek medical help in violation of their faith, but are willing to turn the problem over to the child welfare authorities rather than face prosecution, then this alternative might actually protect more children.

It is possible that RLPA might require it as a less restrictive means, although I expect that courts would be resistant to this argument. Certainly it would be difficult to make this argument on behalf of a parent who had not notified the child welfare authorities of his child's illness. If the parent gave such notice, the authorities failed to respond, and later the same authorities prosecuted the parent, the sequence would suggest that the authorities were more interested in suppressing the religion than in protecting the child. Conversely, the parent would be on weak ground if he had not notified the authorities, and then tried to defend later on the ground that he would have or might have notified the authorities if they had announced a general policy promising immunity to parents who notified them of a child's illness. Courts are unlikely to let the parent off on this ground, but if some court does, the result would be that the state enacts such a policy.

The bottom line is that Professor McConnell's answer poses no threat to children. Professor Hamilton's speculation about courts requiring ineffective enforcement misunderstands least restrictive means. The least restrictive means of achieving a compelling interest is a means that actually achieves the interest. Because the health and safety of children is such an interest, RLPA will not interfere with achieving that interest.

**2. Do you believe that the Prison Litigation Reform Act adequately addresses the concern that frivolous cases based on "sham" religions or suspect religious practices will be filed unless prisoners are exempted from RLPA?**

Yes. First of all, the Prison Litigation Reform Act is either adequate to do the job, or it is not. If it is inadequate, the problem is not confined to RLPA, but extends to prisoner litigation across the board. The remedy would be to further strengthen the Prison Litigation Reform Act.

RFRA was not a significant addition to the problem of prisoner lawsuits. The only jurisdiction that has reported any real data is Texas, in its amicus brief in *City of Boerne v. Flores*. The Texas Attorney General handles about 26,000 active cases at any one time. Of those, 2200 are "inmate-related, non-capital-punishment cases." Of those, 60 had RFRA claims when RFRA was in effect with respect to the states. This is 2.7% of the inmate caseload, and .23% of the total caseload. It is also a safe bet that many of the 60 would have been filed anyway, on free exercise, free speech, Eighth Amendment, and other theories.

These data tend to confirm what simple logic would tell us anyway: the problem was not RFRA, but prisoner litigation generally. The Prison Litigation Reform Act appears to be bringing that problem under control. Litigation by state and federal prisoners, in federal court, dropped 31% in the first year after the Prison Litigation Reform Act. This data is reported in *Crawford-El v. Britton*, 118 S.Ct. 1584, 1596 n.18 (1998). Filings should drop further as prisoners become more aware of the Act and of the consequences of frivolous filings.

It is well known that prisoners file frivolous claims. It is less well known that prison authorities sometimes make frivolous or abusive regulations. Judge Posner, a Reagan appointed judge, used RFRA to strike down a Wisconsin rule that prevented prisoners from wearing religious jewelry, finding

the rule virtually irrational. *Sasnett v. Sullivan*, 91 F.3d 1018, 1022-23 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997). Judge Noonan, another Reagan appointed judge, used RFRA to grant relief when Oregon jail officials arranged to surreptitiously record the sacrament of confession between a prisoner and the Catholic chaplain. *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997). One of my students settled a case, *McClellan v. Keen*, in which Colorado had let a prisoner out on work release and to attend Episcopal services, but forbid him to take communion -- because of a "neutral" rule against consuming alcohol. As explained in my response to Question 1.A. from Senator Thurmond, prison authorities in *O'Lone v. Shabazz* discriminated against Muslims with respect to attendance at the central worship service of the faith. These examples show that prisoners need the protection of RLPA, even if Congress and the legal system also need to craft general solutions to the problem of frivolous prisoner litigation.

Finally, religion is one of the few routes to rehabilitating prisoners that really works in some significant percentage of cases. This is another reason why the solution is to restrict frivolous litigation, but not to eliminate RFRA, or to wholly eliminate prisons from the scope of RFRA.

**3. Are there any examples of cases in which prison administrators have been able to successfully deny religious exemptions because of security or public health and safety concerns that, in your opinion, would most likely NOT be upheld using the strict scrutiny analysis?**

No. As noted in my answer to Question 2 from Senator Thurmond, prison authorities won nearly all the cases decided under RFRA, which applied the compelling interest and least restrictive means test. None of the few cases they lost posed any threat to prison security, public health, or safety. These results would not change under RLPA.

Professor Hamilton will likely give you a different answer, but please examine whether that answer is based on anything. The least restrictive means test was in effect for three and a half years, and nearly one hundred prison cases were decided. The least restrictive means is a means that will actually achieve the government's interest.

#### Questions from Senator Feingold

1. Although this may be a minority opinion, I would like you to comment on whether RFRA and now RLPA may be a violation of the Establishment Clause. As noted by Justice Stevens in his concurrence in *Boerne*:

RFRA is a law respecting an establishment of religion that violates the First Amendment of the Constitution. If the historic landmark on the hill in *Boerne* happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

As I understand it, the Supreme Court held in *Texas Monthly v. Bullock* that while government cannot favor one religion over another, it may also not favor religion over non-religion. That being the case, how does *Bullock* reflect on the constitutionality of RFRA and RLPA?

*Texas Monthly v. Bullock*, 489 U.S. 1 (1989), does not question the constitutionality of RFRA or RLPA. At most it holds that government cannot favor religion over non-religion unless it is not relieving a burden on religious exercise; the case may be further confined to speech issues and/or to tax exemptions. What is clear is that none of the opinions in the case question the validity of religious exemptions from burdensome regulations, and the plurality opinion expressly approves of such exemptions. "[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18-19 n.8.

*Texas Monthly* must not only be read in light of this footnote, but also in light of *Board of Education v. Grumet*, 512 U.S. 687, 705 (1994), *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *Amos* unanimously holds that Congress can exempt the exercise of religion from burdensome regulation, even when the exemption is not required by the Free Exercise Clause. The Court says explicitly that such exemptions need not "come packaged with benefits to secular entities." *Id.* at 338. Both *Grumet* and *Texas Monthly* explicitly reaffirm *Amos*. 512 U.S. at 705; 489 U.S. at 18-19 n.8. *Smith* affirmatively invites legislative exemptions for religious exercise. 494 U.S. at 890. And in the cases requiring exemptions under the Free Exercise Clause, the Court repeatedly rejected the argument that such exemptions violated the Establishment Clause. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987); *Thomas v. Review Board*, 450 U.S. 707, 719-20 (1981); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963). These cases were reaffirmed in *Smith*, as part of the individualized consideration exception, and are still good law. 494 U.S. at 883-84; *see also Frazee v. Illinois Employment Security Department*, 489 U.S. 829 (1989) (unanimously enforcing *Sherbert*).

*Grumet* is perhaps most revealing, because it is the most recent of these cases, and it is after *Smith*. The majority held that New York could not confer the "anomalously case-specific" accommodation in that case, which benefitted a single small group of a single faith, the Satmar Hasidim. 512 U.S. at 703. But every Justice reaffirmed legislative power to exempt religious practice from burdensome regulations:

[W]e do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.

*Id.* at 705 (opinion of the Court by Justice Souter, joined by Justices Blackmun, Stevens, O'Connor, and Ginsburg).

[The program at issue in *Grumet*] is unlike . . . a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion.

*Id.* at 711-12 (Justice Stevens, concurring, joined by Justices Blackmun and Ginsburg).

What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect. . . . The Constitution permits

"*nondiscriminatory* religious-practice exemption[s]," *Smith, supra*, at 890 (emphasis added [by Justice O'Connor]), not sectarian ones.

*Id.* at 715-16 (Justice O'Connor, concurring).

Before the Revolution, colonial governments made a frequent practice of exempting religious objectors from general laws. [citing examples] And since the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices. [citing cases] . . . Attending the Monroe-Woodbury public schools, where they were exposed to much different ways of life, caused the handicapped Satmar children understandable anxiety and distress. New York was entitled to relieve these significant burdens, even though mainstream public schooling does not conflict with any specific tenet of the Satmar's religious faith.

*Id.* at 723-24 (Justice Kennedy, concurring).

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). Moreover, "there is ample room for accommodation of religion under the Establishment Clause," *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) . . . Accommodation is permissible, moreover, even when the statute deals specifically with religion, see, *e.g.*, *Zorach v. Clauson*, 343 U.S. at 312-315, and even when accommodation is not commanded by the Free

Exercise Clause, see, e.g. *Walz [v. Tax Comm'n]*, 397 U.S. 664], 673 [(1970)].

*Id.* at 743-44 (Justice Scalia, dissenting, joined by Chief Rehnquist and Justice Thomas).

What then does *Texas Monthly* actually hold? In a badly splintered set of opinions with no majority, the Court struck down a sales tax exemption for religious publications. The case is different in multiple ways from *Amos*, *Smith*, *Grumet*, *Hobbie*, *Thomas*, *Sherbert*, and RLPA.

First, *Texas Monthly* was different because it involved a sales tax, and the plurality plainly did not believe that a neutral sales tax burdens the exercise of religion. This view was confirmed by the unanimous decision a year later in *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), holding that such a tax imposed no cognizable burden under the Free Exercise Clause. A sales tax is modest in amount and incidental to transactions that generate revenue with which to pay the tax; rightly or wrongly, the Court viewed such taxes as not a burden. Thus, the plurality distinguished *Texas Monthly* from *Amos* on the ground that in *Texas Monthly*, there was no cognizable burden to be relieved. 489 U.S. at 18-19 n.8.

Second, *Texas Monthly* was different because it involved speech; the simplest explanation for the decision is that the exemption imposed viewpoint discrimination among the various publications. That was Justice White's reason for voting to strike down the exemption under the Free Press Clause. It was at the heart of Justice Blackmun's reasoning (for himself and Justice O'Connor) under the Establishment Clause; they thought it would be permissible to exempt publications on questions related to religion so long as there were no viewpoint discrimination. *Id.* at 27-28. Justice Brennan (for himself, Justice Marshall, and Justice Stevens) also emphasized the point. 489 U.S. at 15 ("This [the apparent endorsement of religious beliefs] is particularly true where, as here, the subsidy is

targeted at writings that *promulgate* the teachings of religious faiths.") This prohibition on viewpoint discrimination in the government's treatment of speech is what the case actually stands for; under the Supreme Court's rules of stare decisis, a judgment with no opinion of the Court stands for the narrowest ground relied on by a Justice essential to the result.

Third, *Texas Monthly* was different because it involved tax and tax exemption. Financial support for religion is at the heart of the Establishment Clause, and tax exemption can be understood as a form of financial support. Justice Brennan's opinion for the plurality discussed the Court's cases on tax exemption and financial support at length; it said much less about the cases on regulatory exemptions. Justice Blackmun's opinion repeatedly talked about the taxes and tax exemption, never mentioning regulatory exemptions.

RLPA applies only when government "substantially burden[s]" religious exercise. It is therefore squarely within *Amos*, *Grumet*, and footnote 8 of *Texas Monthly*. RLPA does not attempt to modify the Court's view that sales taxes are not a burden, so RLPA would not apply where *Texas Monthly* controls. All or most of RLPA's applications will involve regulatory exemptions, not tax exemptions. Of course *Texas Monthly*'s principle of equal treatment would be relevant to interpretation of RLPA in any effort to apply the Act to tax exemptions or religious speech. But none of the three opinions making up the majority in *Texas Monthly* cast doubt on the Court's repeated decisions upholding regulatory exemptions against challenge under the Establishment Clause.

As to Justice Stevens' concurring opinion in *Boerne*, it attracted no vote but his own. And with all respect to Justice Stevens, the opinion is fundamentally confused. A museum or art gallery owned by a Catholic would not have been protected by RFRA either. The exemption does not depend on the religious belief of the owner, but on the use to which the property is put. The proper analogy to a church would be a

building set aside for meetings to promote or celebrate atheism. That building might well be protected, by RFRA or RLPA or by the Free Speech Clause or even the Free Exercise Clause. See *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) (Warren Burger, J.); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. App. 1957). Certainly I would defend an interpretation of RLPA that requires equal treatment of all organizations that exist to promote views about religious questions.

**2. Please allow me to ask another question that addresses the Establishment Clause issue. What if conscription was reestablished, and a man objected due to religious reasons -- he would at least have a claim under RFRA or RLPA would he not? But if a man objected to conscription for some deeply held and sincere secular beliefs, he would not have such a claim.**

Conscientious objectors to military service would have a claim under RFRA, and they could use RLPA to shift the burden of persuasion on any free exercise claim. But neither sort of claim is likely to be successful. Before *Employment Division v. Smith*, when the rule was that the Constitution requires regulatory exemptions subject to the compelling interest test, the Court rejected constitutional claims to exemption from military service. *Gillette v. United States*, 401 U.S. 437 (1971). The Court held that the government's interest in raising a military force, and the difficulty of resolving claims to exemption, were great enough to justify the burden on religious exercise. The Court thus refused to constitutionalize the right to exemption from military service, and confined that right to the statutory right created by Congress.

I would expect a similar holding under RFRA and RLPA, either on the ground that the compelling interest test is satisfied, or on the ground that Congress has dealt with exemption from military service more specifically in the

selective service law, and that the more specific provision is controlling.

- **Is providing such a claim for religious beliefs and not for other deeply held secular beliefs a violation of the Establishment Clause?**

No. But I should add that the line between religious and secular belief is blurred with respect to conscientious beliefs about killing other human beings. These beliefs are so deeply held, and so obviously of the greatest moral significance, that the courts have interpreted "religious" very broadly. The Military Selective Service Act protects conscientious objection "by reason of religious training and belief," 50 U.S.C. App. §456(j) (1994), but the Court has read that language to include a belief "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." *Welsh v. United States*, 398 U.S. 333, 339 (1970) (plurality opinion); *Seeger v. United States*, 380 U.S. 163, 176 (1965).

The Court's interpretation of the draft exemption was influenced in part by constitutional concerns about attempting to distinguish religious and secular bases for conscientious objection with respect to killing other human beings. But as explained in my response to Question 1, the Court has repeatedly rejected the claim that the Establishment Clause generally prohibits any distinction between religious and secular regulatory exemptions. Justice Harlan's concurrence in *Welsh* was based on that view, but his view has never been the law.

- **What if the conscientious objector in my hypothetical claimed that his deeply held beliefs were secular in nature, but nonetheless constituted a "religion" for him -- would he then have a claim under RFRA or RLPA?**

He would have a claim under the Military Selective Service Act as interpreted in *Seeger* and *Welsh*, and he would have a plausible claim that RFRA and RLPA should be interpreted the same way. Congress re-enacted the statutory language on conscientious objection without change after *Seeger* and *Welsh*, and Justice O'Connor recently indicated her view that these cases are still good law, at least in the special context of military service. *Grumet*, 512 U.S. at 716.

- **For the purposes of RLPA, what do you see as the definition of a "religious" belief or exercise? That is, what distinguishes a religious belief from a secular belief?**

Neither Congress nor the Coalition for the Free Exercise of Religion is likely to fully agree on the answer to this question. But most of the Coalition, and I think most of Congress, would nearly always agree on the categorization of the belief in actual cases. Much theoretical ink has been spilled on the definition of religion for legal purposes, but in the actual cases, this is an issue only very occasionally. It is easier to agree on sensible results than to state a general test; the few difficult cases at the margins must be worked out case by case.

I can say with confidence that the Coalition intends a broad and inclusive definition of religion. I hope and believe that Congress shares this intent. This has been the practice of the government under similar legislation. *Seeger*, *Welsh*, and the Military Selective Service Act are one example. Another example is the EEOC's interpretation of "religion" in Title VII of the Civil Rights Act of 1964, which relies on *Seeger* and *Welsh* but appears to me to be broader than those cases. 29 C.F.R. §1605.1 (1997).

Judicial interpretation of what counts as religion has also been broad. As I noted in response to Senator Thurmond, the courts have protected individualized religious beliefs without regard to whether they were shared by any denomination.

*Frazer v. Illinois Department of Employment Security*, 489 U.S. 829 (1989); *Thomas v. Review Board*, 450 U.S. 707 (1981). They have protected beliefs that were religious in the understanding of the believer, even if the content of those beliefs would not have seemed religious in ordinary understanding. *Patrick v. Le Fevre*, 745 F.2d 153 (2d Cir. 1984). Courts repeatedly say that the question is whether the belief is religious "in the claimant's scheme of things." *Wilson v. Schillinger*, 761 F.2d 921, 925 (3d Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986); *Kaplan v. Hess*, 694 F.2d 847, 851 (D.C. Cir. 1982). Courts have held that atheism is a protected religious belief entitled to accommodation under Title VII. *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975). And courts have treated nontheistic meeting houses as churches for purposes of tax exemption laws. *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) (Warren Burger, J.); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. App. 1957).

But courts have refused to protect disagreements rooted in politics, economics, judgments about harmful consequences, or competing personal and temporal commitments, however intensely those disagreements might be felt. *United States v. Allen*, 760 F.2d 447 (2d Cir. 1985); *Africa v. Pennsylvania*, 662 F.2d 1025, 1033-34 (3d Cir. 1981). Views about religion are different from views about other matters in our constitutional tradition. The First Amendment privatizes disagreements rooted in religion, putting them beyond the reach of government policy; disagreements rooted in politics or other secular matters are necessarily left to resolution by the political process. Thus in *Allen* the court concluded that nuclear weapons protestors' disagreement with the government was not religious:

In essence, then, the antinuclear protestors like appellants believe that nuclear weapons have no purpose but destruction, while pronuclear supporters believe that nuclear weapons help to

keep the peace. The two sides in the nuclear debate thus differ primarily in their perception of the way the world works, not necessarily in their ultimate concern for peace. This difference we hold to be one of political judgment, not religious belief.

760 F.2d at 450. On political disagreements, Americans speak, argue, and vote. On religious disagreements, some Americans speak and argue, and others keep their silence. But we do not vote. Courts have understood this difference, and it is one of the considerations that has helped to mark the boundary between religious beliefs and other beliefs.

If the choice were to protect all significant beliefs or none, the political system would protect none. But never in American history has that been the choice. Religious beliefs have been specially protected, and our understanding of what counts as religious has expanded as religious diversity has expanded. Beliefs that are genuinely analogous to traditional religious beliefs should be protected. Beliefs that are not sufficiently analogous to deserve protection are not sufficiently analogous to invalidate protection for those that are. Drawing the boundary is just that — a classic line-drawing problem. Where ever the line is drawn, the law is clear that it is not unconstitutional to discriminate between religious and secular beliefs.

**3. Some commentators have suggested the RFRA and now RLPA may have some Free Speech problems. For example, take the case of a claim for exemption from solicitation and literature distribution regulations. In such a case, it seems to me that the granting of an exemption for only religious adherents would violate the First Amendment principle that there is an equality in the realm of ideas.**

**- If RLPA were interpreted to allow the religious speaker the right to solicit funds and**

**distribute literature in circumstances where the non-religious speaker would be denied this right, should not the statute be struck down under the Freedom of Speech clause?**

RLPA should not be interpreted to provide greater protection to religious speech than to other high value speech, such as political speech. This was understood when RFRA was enacted, and I think that I recall language in the House Report (H.R. Rep. 103-88) expressing the intention that religious speech be treated equally with other speech. I do not have a copy of the House Report at hand, but the point is valid, whether or not the House Committee said so. If RLPA were interpreted to provide greater protection for religious speech than for political speech, it would be presumably be unconstitutional as applied. But I think the more likely outcome is interpretation that will avoid the problem.

I should also note that some kinds of speech get somewhat less than the full measure of First Amendment protection. Commercial speech is the most important example; pornographic speech is a more extreme example. I do not believe that religious speech can never be given greater protection than commercial speech, but I do believe that religious speech must be treated equally with political speech.

**4. RLPA obviously works under the assumption that laws of general applicability which detrimentally affect a person's Free Exercise rights are an evil that we must protect against. I agree. In furtherance of this objective the bill would provide that a RLPA plaintiff will not need to demonstrate that the government intended to discriminate against them. Yet, the Supreme Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* -- a land use/zoning case -- that for racial discrimination disparate impact is insufficient. Indeed, a plaintiff claiming racial discrimination must demonstrate an intent on the part of the government to do so.**

**Why should a plaintiff claiming religious discrimination have a much lower threshold than a plaintiff claiming racial discrimination?**

Disparate impact is insufficient for race discrimination under the Constitution, just as disparate impact is insufficient for the free exercise of religion under the Constitution. The Court made this very analogy in *Employment Division v. Smith*, 494 U.S. 872, 886 n.3 (1990).

But Congress has repeatedly responded. Disparate impact is enough for race discrimination in employment under Title VII, in voting rights under the Voting Rights Act of 1982, and in your example of land use, the Fair Housing Act prohibits housing practices with disparate impact. Indeed, the Arlington Heights case that you cite was remanded, subjected to disparate impact theory under the Fair Housing Act, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), and eventually settled on terms highly favorable to plaintiffs. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1009 (7th Cir. 1980).

Other circuits also read the Fair Housing Act to cover disparate impact. *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997); *Larkin v. Michigan Department of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

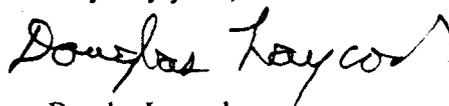
The Fair Housing Act rarely applies to churches, synagogues, and mosques, because they are not housing. The practical problems of proof are somewhat different, requiring different statutory language. But the repeated pattern is that

Congress supplements the protection that the Supreme Court finds inherent in the Constitution, whether for race, religion, or other protected categories.

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I thank the Committee for its careful attention to this bill. If any of my answers require clarification, please do not hesitate to ask.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas Laycock". The signature is written in black ink and is positioned to the right of the typed name.

Douglas Laycock

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## RESPONSES OF MARCI A. HAMILTON TO QUESTIONS FROM SENATOR HATCH

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July 6, 1998

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The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-06275

RE: Response to queries regarding S.2148 *The Religious Liberty Protection Act of 1998*

Dear Senator Hatch:

Thank you for your letter asking for further clarification of my views on the constitutionality and significance of the Religious Liberty Protection Act of 1998 ("RLPA"). Your letter, which included questions from Senators Thurmond, Grassley, DeWine, Feingold, and yourself, asks a wide variety of questions, some constitutional and some pragmatic.

Before I turn to the substance of RLPA, I believe it is important to emphasize that many of the questions asked in your letter and many of the questions that ought to be asked about this bill cannot be answered solely by legal scholars.

To my knowledge, this Committee has heard no testimony to date from those who will be harmed by this bill. You will not have adequate information to judge the constitutionality, the appropriateness, or the proportionality of this bill unless you hear from a broad cross-section of the huge number of interests that will be affected. Those groups include school boards, municipalities, the states, neighborhood organizations, historical and arts preservation groups, departments of corrections, prison officials, pediatricians interested in universal immunization, those concerned about child and spousal abuse, those in favor of the nation's and the states' anti-discrimination laws (which prevent discrimination on the basis of race, gender, sexual orientation, marital status, and disabilities), and any groups dedicated to preserving meaningful limits on Congress's exercise of its power.

If RLPA looks attractive, it is only because it is being examined from the perspective of those most likely to benefit from it. It will have real consequences that are troubling. For example, RLPA, like the Religious Freedom Restoration Act of 1993 ("RFRA"), creates a

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defense to every criminal law: from statutory rape laws to child and spouse abuse laws to child neglect laws. Moreover, like RFRA, whether the religious claimant wins or not, it is indisputable that litigation will increase.

**ANALYSIS OF S. 2148, THE RELIGIOUS LIBERTY PROTECTION ACT OF 1998**

**Introduction.** As the hearings on June 23, 1998, made clear, the purpose of RLPA is to displace the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), in as many scenarios as possible.<sup>1</sup> To that end, RLPA attempts to augment Congress's power by expanding the Commerce Clause, Spending Clause, and Fourteenth Amendment powers to new extremes. RLPA would amend the First Amendment through simple majority vote. This violates the separation of powers and overtakes the rigorous procedures for amendment found in Article V. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).<sup>2</sup>

When the Court invalidated the Religious Freedom Restoration Act in *Flores*, it stated the following, which is relevant to Congress's current desire to displace the Supreme Court's decision in *Smith* with a standard more to its liking:

Under our Constitution, the Federal Government is one of enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

"[The Constitution is] superior paramount law, unchangeable by ordinary means. [It is not] on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." *Id.* at 177.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions

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<sup>1</sup> For a discussion of the difference between purpose and motive in statutory interpretation, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864 (1992).

<sup>2</sup> The fact that Congress is engaging in a constitutional rather than a statutory exercise is reinforced by Senator Thurmond's questions asking which constitutional standard Congress should choose for the prison scenario. Congress may not pick and choose between the Supreme Court's constitutional precedents. See *Flores*, 117 S. Ct. at 2168 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles. . . .

*Flores*, 117 S. Ct. at 2162, 2168, 2172 (citations omitted).

1. **The Commerce Power.** The test to be applied in Commerce Clause cases is two-fold. First, the courts must ask whether the law regulates activity that "substantially affects" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Second, the courts must consider the inherent limits of federalism on the exercise of the Commerce Clause. The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.* at 566.

*Prong One: Substantially Affects Commerce.* The plain language of RLPA states that the activity that "affect[s] commerce" is religious conduct. See § 2(a)(2) (limiting government burdens on "religious exercise in or affecting commerce"). There are two problems with RLPA's formulation. First, it attempts to capture all religious conduct that merely "affects" commerce. In *Lopez*, the Court explicitly rejected the simple "affects" test and embraced the requirement that the activity must "substantially affect" the regulated activity. 514 U.S. at 559.

Second, it should go without saying that the vast majority of religious conduct has nothing to do with commerce. Hair length, the decision to wear a particular religious symbol, the wearing of yarmulkes, the laying on of hands, the construction of a sweat lodge, etc., are actions that do not have substantial impact on interstate commerce. Indeed, to many religions, the characterization of religion as an economic activity is offensive, as evidenced by the fact that a coalition of religions has refused to support this bill because it reduces religion to economics.

*Prong Two: The Limits of Federalism.* Congress may not employ its Commerce Clause power in a way that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. This bill intervenes in every situation where a local or state government attempts to enforce its generally applicable, neutral laws that incidentally burden religious conduct. The states fail to retain authority over any law, and especially over land use laws, that can be challenged by a religious believer under RLPA. Principles of federalism require Congress to respect state sovereignty by finding means to achieve legitimate federal ends that are less invasive. See generally *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1997). Just as principles of federalism force Congress to exercise its Fourteenth Amendment powers in ways that are proportional and congruent, they limit the exercise of Congress's Article I powers.

2. **The Spending Power.** Under *South Dakota v. Dole*, 483 U.S. 203 (1987), a federal

law is a valid exercise of Congress's power under the Spending Clause if there is a nexus between the spending and the condition attached to the spending. *See id.* at 207. (“[C]onditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.”).

The condition attached to spending under RLPA is that the government or governmental entity receiving federal financial assistance will subject itself to suits (including the cost of attorneys' fees, *see* § 4(b)) whenever its generally applicable, neutral laws substantially burden any religious claimant's conduct. The only way to avoid such liability is to refuse the federal financial assistance. On the current state of the record, Congress has not begun to ask what the nexus is between its national interest in any spending program and burdens on religious conduct. Neither House of Congress has even attempted to survey the vast sweep of spending programs and instances of financial assistance implicated by this bill. Where the constitutional basis for congressional action is not “visible to the naked eye” and Congress provides no “particularized findings” to support the law, the courts appropriately invalidate the law rather than provide the factual predicate that they are ill-equipped to provide. *See, e.g., Lopez*, 514 U.S. at 563.

Further, the “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion’” and therefore exceeds Congress's power under the Spending Clause. *Dole*, 483 U.S. at 211. RLPA is as coercive as it gets. It is mandatory for all those government programs that receive any federal financial assistance. The states and local governments must choose between taking the assistance with the liability or taking no funds. RLPA is unlike the highway bill upheld in *Dole*, which penalized states that did not set the state's drinking age to a minimum of twenty-one by taking away only a small percentage of the federal highway funds provided.

3. Section 5 of the Fourteenth Amendment and § 3(b). Section 3(b) of RLPA federalizes local land use in every scenario where religious claimants claim burdens on their religion. Although the section heading indicates that § 3 is intended to enforce the Free Exercise Clause, § 3(b) governing land use is not limited in its language to violations of the First Amendment. Under the statutory construction rule that precludes the use of headings to interpret the plain meaning of provisions, the language of § 3(b) must be read alone. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 525 (1982) (refusing to prescribe any significance to the heading of a statute); *United States v. Minkler*, 350 U.S. 179, 185 (1956) (But “the title of a statute and the heading of a section cannot limit the plain meaning”). Thus, the land use provisions apparently apply to every land use scenario where religious claimants claim a burden on religious conduct. The burdens they place on local land use law is extraordinary. The Congress bears a heavy burden of justifying the need for such an invasion of this traditional arena of local control.

Under *City of Boerne v. Flores*, the Congress may only enforce constitutional rights if there is congruence between the means chosen and the end of preventing constitutional violations. “While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means chosen and the ends to be achieved. Strong measures appropriate

to address one harm may be an unwarranted response to another, lesser one." 117 S. Ct. at 2169.

To prove congruence, two facts need to be widely recognized or established through reliable fact finding. First, the states and local governments must have done something unconstitutional or likely unconstitutional to justify the federal intervention in their affairs. See *The Civil Rights Cases*, 109 U.S. 3 (1883), cited in *Flores*, 117 S. Ct. at 2166. Second, the means chosen must be "responsive to, or designed to prevent, unconstitutional behavior." *Flores*, 117 S. Ct. at 2170. Neither prong has been satisfied to date with respect to any of the three extraordinary provisions in § 3.

The anecdotal claims of religious discrimination in discrete communities and the one (unscientific) survey of land use laws thus far presented to the Congress hardly suffice to prove that Congress's sister sovereigns, the States, are engaging in pervasive, or even regular, religious discrimination. They certainly do not prove that the huge net cast by §3 is proportional to whatever harm is out there.

#### 4. The Power of Congress to Accommodate Religion and the Establishment Clause.

According to the Court in *Employment Div. v. Smith*, a "nondiscriminatory religious-practice exemption is permitted." 494 U.S. 872, 890 (1990); see also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994). See, e.g., Dep't of Air Force, Reg. 35-10, ¶ 2-28 (b) (2) (Apr. 1989) (permitting the wearing of religious head covering when military headgear is not required and when the religious head covering does not interfere with the function or purpose of required military headgear); see also American Indian Religious Freedom Act, 42 U.S.C. §1996a (1994) (permitting the Native American use of peyote in religious ceremonies).

There is no case support for the proposition that Congress has the power to provide or force accommodation for religion in a wide variety of fields simultaneously. Justice Stevens pointed out the Establishment Clause evil in RFRA and RLPA in his concurrence in *Flores*. 117 S. Ct. at 2172. Some have tried to make a great deal out of the fact that no other Justice joined Justice Stevens' concurrence. Equally true is the fact that no other Justice mentioned, let alone rejected, Justice Stevens' reasoning or any aspect of Establishment Clause jurisprudence. The oral argument before the Court in the *Flores* case would indicate that a significant number of Justices have sincere concerns regarding the propriety of RFRA (and therefore RLPA) under the Establishment Clause.

As the American Indian Religious Freedom Act makes clear, it is a mistake to assume "minority religions" cannot effectively influence legislative decisions. Small, cohesive groups with a specific and well-articulated message do better in the legislative process than do unorganized majorities. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 127-28 (2d. ed 1971). Proof of that in the religious context is found in the success of the Christian Scientists in obtaining exemptions from general child neglect laws, see 42 U.S.C. § 5106i (1994), not to mention the peyote use exemptions that immediately followed the *Smith* decision. See IDAHO CODE § 37-2732A (West, WESTLAW through 1997 Reg. Sess.); IOWA CODE § 124.204 (8) (West,

WESTLAW through 1997 Reg. Sess.); KAN. STAT. ANN. § 65-4116(c)(8) (West, WESTLAW through 1997 Reg.); MINN. STAT. § 152.02(4) (West, WESTLAW through 1997 3<sup>rd</sup> Sp. Sess.); S.D. CODIFIED LAWS § 34-208-14(17) (Michie, WESTLAW through 1997 Sp. Sess.); TEX. HEALTH AND SAFETY CODE ANN. § 481.11(a) (West, WESTLAW through 1997 Reg. Sess.); WIS. STAT. § 961.115 (West WESTLAW through 1997 Act 26); WYO. STAT. ANN. § 37-7-1044 (Michie, WESTLAW through 1997 Sp. Sess.).

5. **Sovereign Immunity.** The abrogation of state sovereign immunity for Fourteenth Amendment purposes in § 4(d)(1) seems adequately clear under existing law.

6. **Prisoners and Other Arenas Where the Supreme Court Applied Less than Strict Scrutiny Before *Employment Div. v. Smith*, 494 U.S. 872 (1990).** The Supreme Court's opinion in *Smith* accurately explains that the Court had applied strict scrutiny in very few contexts. It also catalogs those cases in which the Court had "abstained from applying" strict scrutiny. 494 U.S. at 882. They include *Bowen v. Roy*, 476 U.S. 693 (1986) (provision of government services); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988) (federal lands); *Goldman v. Weinberger*, 475 U.S. 503 (1986); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisoners). Whatever Congress is told by legal academics or others not on the Supreme Court about the Supreme Court's jurisprudence, the *Smith* opinion is the Supreme Court's most recent definitive statement of the free exercise doctrine, including its history. The more recent decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), merely applies the principles announced in *Smith* in the sect discrimination context.

Under RFRA, prisoners did prevail on claims that would have been decided differently before RFRA. See, e.g., *Craddick v. Duckworth*, 113 F.3d 83 (7<sup>th</sup> Cir. 1997) (invalidating a prison policy against Native American medicine bags, the court held prison failed to make a showing that preventing the wearing of medicine bags was the least restrictive means for addressing safety concerns); *Sasnett v. Sullivan*, 91 F.3d 1018 (7<sup>th</sup> Cir. 1996) (finding that prison policy forbidding all crucifixes as a violation of RFRA because the policy failed to address the compelling interest of safety in the least restrictive means possible); *Harris v. Lord*, 957 F. Supp. 471 (S.D.N.Y. 1997) (holding that the prison's denial of inmate's access to attend weekly Muslim services invalid as the prison failed to show any compelling interest); *Carty v. Farrelly*, 957 F. Supp. 727 (V.I. 1997) (holding that government officials' denial of detainees' access to religious services invalid as the government officials failed to proffer any compelling interest). The most accurate information on the effect of RFRA on prison administration can be obtained by requesting from the federal Bureau of Prisons the number of administrative remedies rendered since RFRA became law in 1993.

The Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e (1994); 28 U.S.C. §§ 1346(b)(2), 1915, 1915A (1994), does not preclude large numbers of frivolous claims from being filed in the federal courts. Rather, it requires exhaustion of administrative remedies, permits the courts to throw out such claims with more alacrity, and limits the number of filings on the same theory by indigent prisoners. See 42 U.S.C. § 1997e (1994) (requiring the prisoner to exhaust all

administrative remedies before bringing suit, barring suits for mental or emotional injury absent a showing of physical injury, limiting attorney fees, screening complaints before docketing in order to discard all malicious and/or frivolous suits); see also 28 U.S.C. §§ 1915, 1915A (1994) (denying in forma pauperis status to prisoners with three or more prior dismissals for failing to state a claim upon which relief can be granted, and malicious or frivolous suits unless the prisoner is "under imminent danger of serious physical injury" and requiring the payment of filing fees).

7. Strict Scrutiny in the Supreme Court's Free Exercise Jurisprudence. Strict scrutiny is required under the Court's free exercise jurisprudence in a number of scenarios: (1) when a law discriminates against a religion or religion in general, *Church of Lukumi Babalu Aye*, 508 U.S. at 532-33 (1993); (2) when a law is not generally applicable, *id.* at 542-43; (3) when a law impinges on hybrid constitutional rights, see *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990); and (4) when a law is subject to individualized determinations, *id.* at 877-78. There may be other instances as well that will merit strict scrutiny as the Court's free exercise doctrine evolves in future years (if there are no RLPA and no state mini-rfra's to get in the way of litigating the meaning of *Smith*). The debate over RFRA and now RLPA has been marred by an overly simplistic reading of *Smith* that does not do it justice.

8. The Definition of Religion. On the question of conscription laws and whether it is permissible to distinguish between secular and spiritual beliefs, it would appear that such a distinction is constitutionally suspect. The Supreme Court gave an expansive interpretation of religion in *United States v. Seeger*, 380 U.S. 163 (1965), to permit a conscientious objector asserting nontheistic and secular moral beliefs to satisfy the statutory rule permitting religious conscientious objection. The Court avoided reading the statute to require distinguishing between religious and irreligious views. In *Welsh v. United States*, Justice Harlan stated that Congress may not "draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other." 398 U.S. 333, 1805 (1970) (Harlan, J., concurring).

With respect to the use of centrality in determining whether a religious belief has been substantially burdened, the lower courts are fairly evenly split between the standard applied in *Bryant v. Gomez*, 46 F.3d 948 (9<sup>th</sup> Cir. 1995) (limiting substantial burdens to those that burden a central tenet that is mandated by religious doctrine) and *Werner v. McCotter*, 49 F.3d 1476 (10<sup>th</sup> Cir. 1995) (permitting substantial burden to be shown where burden rests on central tenet of prisoner's individual beliefs"). Both formulations limited the reach of RFRA but their formulations are called into question by the *Smith* Court's negative dictum regarding inquiries into the "centrality" of religious beliefs. See 494 U.S. at 886-87, 890.

RLPA eschews the "centrality" requirement in § 8(1) but distinguishes between religions by limiting its protections to those beliefs that participate in a "larger system of religious belief." It is most likely unconstitutional under the Establishment Clause for a court to determine that the beliefs of one person (as opposed to a larger system of religious beliefs) are not a religion. Section 8(1) does require courts to examine the subjective state of the religious believer by defining "religious exercise" in terms of the believer's motivation.

A summary judgment disposition under RLPA would be precluded whenever there is a genuine dispute over the sincerity of the religious claimant. Such a dispute makes a credibility determination necessary. There are, of course, many cases in which the sincerity of the religious claimant cannot be questioned. In many other scenarios, especially the prison context, the incentives to create new "religions" to gain other ends force the courts to engage in the fact-finding necessary to make sincerity determinations.

9. Constitutionality of RLPA as Applied to Federal Law. The Religious Freedom Restoration Act is unconstitutional even when applied to federal law. See generally Eugene Grossman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS: A J. OF OPINION 73, Fall 1997 (1997); Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998); Marci A. Hamilton, *The Constitutions Pragmatic Balance of Power Between Church and State*, 2 NEXUS: A J. OF OPINION 33, Fall 1997; Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998). The lower courts are split on the issue, making it ripe for Supreme Court review in the near future. Compare *Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8<sup>th</sup> Cir. 1997) (finding RFRA did not violate the separation of powers doctrine or the establishment clause as applied to federal law), with *United States v. Samba*, No. CR 96-717 MV, 1997 WL 894538 (D.N.M. Dec. 22, 1997) (holding that the *Flores* decision does not permit the continued application of RFRA to the federal government); see also *Alamo v. Clay*, 137 F.3d 1366, (D.C. Cir. 1998) (assuming, without deciding, RFRA is constitutional as applied to federal law).

10. Medical Treatment for Children. Senator DeWine's question regarding the effect of the "least restrictive means" test on children's legal issues, especially abuse and neglect issues, deserves fuller explanation than I, as a constitutional law scholar, can provide. I relayed this question to one of the leading national authorities on child abuse and neglect, Rita Swan, Ph.D. Her extremely helpful letter is attached as an appendix to this letter along with a copy of the peer-reviewed scholarly article referenced in her letter, Seth Disser and Rita Swan, *Child Fatalities From Religion Motivated Medical Neglect*, PEDIATRICS 101 (Apr. 1998) 625-9.

From the standpoint of legal analysis, Ms. Swan's letter is especially constructive in making clear that the RFRA/RLPA formulation affects not only the laws on the books but also the administration of the laws by government agencies and the courts.

11. Freedom of Speech. Traditionally, regulations affecting religious speech have not been treated to more searching scrutiny than other types of speech. See Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L. J. 713, 741 (1993); see also, Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. (forthcoming 1998). It would be incongruous were Congress to interfere with the Court's jurisprudence on this score.

12. Definition of "federal financial assistance" and "person." Federal regulations define "federal financial assistance" extremely broadly. See 28 C.F.R. § 42.613 (1997); 7 C.F.R. § 15.1

(1997). The term "person" is defined in Title VII as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, United States Code, or receivers." See 42 U.S.C. § 2000e (1994).

Please let me know if I can provide any further assistance.

Sincerely,



Marci A. Hamilton  
Professor of Law

cc: Honorable Charles T. Canady,  
Chair, Subcommittee on the Constitution,  
House Judiciary Committee

## Child Fatalities From Religion-motivated Medical Neglect

Seth M. Asar, MD<sup>\*</sup> and Rita Swann, PhD<sup>†</sup>

**ABSTRACT.** *Objective.* To evaluate deaths of children from families in which faith healing was practiced in lieu of medical care and to determine if such deaths were preventable.

*Design.* Cases of child fatality in faith-healing sects were reviewed. Probability of survival for each was then estimated based on expected survival rates for children with similar disorders who receive medical care.

*Participants.* One hundred seventy-two children who died between 1976 and 1995 and were identified by natural or record search. Criteria for inclusion were evidence that parents withheld medical care because of resistance to religious rituals and documentation sufficient to determine the cause of death.

*Results.* One hundred forty fatalities were from conditions for which survival rates with medical care would have exceeded 90%. Eighteen more had expected survival rates of >50%. All but 3 of the remainder would likely have had some benefit from clinical help.

*Conclusions.* When faith healing is used to the exclusion of medical treatment, the number of preventable child fatalities and the associated suffering are substantial and warrant public concern. Existing laws may be inadequate to protect children from this form of medical neglect. *Pediatrics* 1998;101:625-629; *child abuse, child neglect, child fatality, Christian Science, faith healing, medical neglect, prayer, religion and medicine.*

Despite the great advances of scientifically based medicine, some individuals and groups continue to look primarily outside of modern medicine for remedial care.<sup>1</sup> Applied to minor or self-limited problems, many nonmedical practices are probably benign, but may lead to avoidable morbidity and mortality with more serious ailments.

Claims that prayer or religious beliefs have psychological or other benefits that contribute to illness recuperation are scientifically testable and perhaps supported by some evidence.<sup>2,3</sup> Although some churches have published testimonials claiming that organic and functional diseases are healed by soliciting divine power, this has not been confirmed by scientifically valid measures.<sup>4</sup> Death rates in graduates of a Christian Science college, a group whose central tenets deny the reality of disease and promote avoidance of medical services,<sup>5</sup> have been reported to be higher than graduates of a secular institution.<sup>6</sup> Although legal precedents have established the

right of an adult to refuse life sustaining treatment, they do not allow parents or guardians to deny children necessary medical care. The US Supreme Court stated this principle eloquently: "The right to practice religion freely does not include the liberty to expose the community or child to communicable disease, or the latter to ill health or death . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion. . . ."

Despite this ruling, in late 1976 the US Department of Health, Education, and Welfare required states receiving federal child abuse prevention and treatment grants to have religious exemptions to child abuse and neglect charges.<sup>7</sup> With federal money at stake, states rapidly enacted exemptions for parents who relied on prayer rather than medical care when their children were sick or injured. A decade later nearly every state had these exemptions in the juvenile code, criminal code, or both.<sup>8,9</sup>

A few cases of children who died because of religion-motivated medical neglect have received national press coverage, but most got little or none. Reports in the medical literature are also rare. The American Academy of Pediatrics' first policy statement against religion-based medical neglect in 1968 cited press accounts rather than case reports.<sup>10</sup> Outbreaks of vaccine-preventable disease among groups with religious objections to immunization are reported frequently.<sup>11-14</sup> However, medical citations of fatalities are rare.<sup>15,16</sup> One study of perinatal events reported an Indiana sect that had a threefold increase in infant mortality and an 80-fold increase in maternal mortality compared with the general population.<sup>17</sup> The study reported here describes deaths that have occurred after the federal government required religious exemptions to child abuse and neglect laws.

### METHODS

We compiled a list of child fatalities in the United States that occurred during the period from 1975 through 1995. Initial cases were from the files of Children's Healthcare is a Legal Duty (CHILD), Inc, a nonprofit organization that gathers information on religion-based child abuse and neglect. These cases were collected from newspaper articles, trial records, personal communications, and public documents. With institutional review board approval, police records, coroner's files, and other confidential materials were examined for additional information. During this supplemental search, 4 additional candidates were identified.

Cases were included if the available information, including clinically descriptive histories and/or post mortem medical data, was sufficient to determine the cause of death with reasonable

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medical certainty, the standard for presentation of a medical opinion in most courts. This was assumed by one author (S.M.A.), a pediatrician who has qualified in court to examine records and present expert opinion in child fatality cases.

Cases were excluded if documentation of the cause of death was inadequate or if the history did not indicate that failure to seek medical care was primarily based on a reliance on faith healing. Examples of the latter include children of some Aish kashomerim where the doctors to care are more cautious than theological and children of Jehovah's Witnesses who were denied only blood products and were not expected to be healed by divine intervention.

After considering the underlying conditions and diagnoses that directly contributed to death, children were assigned a likely outcome with commonly available remedial or preventive medically supervised care (Table 1). Because medical advances altered expected mortality rates during the study period, comparisons were based on clinical experience and published statistics of the appropriate era. For chronic conditions (eg, cancer, diabetes) survival was compared with long-term survival rates published in journals or textbooks from the relevant field. For acute problems, such as infections and perinatal complications, the logical comparison was expected mortality during the acute process.

In most cases, the diagnosis permitted an assignment to an expected outcome based on a published statistic. For example, the mortality rate for treated cases of Rocky Mountain Spotted Fever in 1989 was 2%, less than one-third the rate for untreated cases.<sup>19</sup> Thus, a death during 1984 was considered to have an excellent probable outcome with medical treatment.

In other situations, a diagnostic group could be identified, but not a specific disease. A child with acute lymphocytic leukemia presenting for medical attention in 1977 would have an expected 3-year survival of 74%<sup>20</sup> and 5-year survival >50%. Thus this child would be placed into the good outcome group. But a child with a nonspecified leukemia could only be assigned based on overall outcome for all types of the disease and was thus placed into the fair group.

In a few instances, judgment based on clinical experience had to be applied. For example, the data in all cases of renal failure were not adequate to determine an etiology for the end-stage disease. However, they were sufficient to exclude acute processes such as Lupus or cancer. All of the teenagers in that group seemed to be good dialysis candidates, ensuring a >90% chance of long-term survival. Thus, the prognosis for their condition was considered excellent. In any situation in which the heterogeneity of clinical presentations made a simple, direct classification difficult, such as in the case of a foreign body aspiration, the most conservative classification that seemed reasonable was assigned.

Infants with fetal demise were placed in favorable prognostic groups only if adequate inspection or autopsy excluded major malformations. Although in utero demise can happen under obstetrical supervision, close monitoring improves detection and treatment of high-risk circumstances that lead to fetal loss. The expected outcome of a third trimester pregnancy is a live born, surviving infant, and thus, for the purpose of this review, expected outcome with care is excellent. Likewise, many of the preterm births might have been delayed with prenatal care or had successful neonatal supportive care. Thus, the expected outcome of preterm infants and stillbirths was considered good.

Some of the infants studied were given the legal term stillborn on death certificates. In many cases, however, autopsy reports and witness statements indicated that death occurred during labor or delivery from causes that would have been mostly prevented or

treated with skilled assistance. Thus, for the purposes of this study, these perinatal deaths were listed in categories other than fetal demise.

## RESULTS

Of 201 cases reviewed, 34 lacked sufficient information to be certain of the cause of death. In 15 cases, it could not be established that exclusive reliance on faith healing contributed to the demise. This left 172 children for evaluation.

### Childhood Fatalities

The diagnoses of 113 children who died after their neonatal period are summarized in Table 2. Of the 98 children who did not have cancer, 92 would have had an excellent prognosis with commonly available medical and surgical care and 4 would have had a good outcome. Only 2 would not have clearly benefited from care. Many histories revealed that symptoms were obvious and prolonged. Parents were sufficiently concerned to seek outside assistance, asking for prayers and rituals from clergy, relatives, and other church members. For example, a 2-year-old child aspirated a bite of banana. Her parents frantically called other members of her religious circle for prayer during nearly an hour in which some signs of life were still present. In another case, a 6-week-old infant, weighing a pound less than at birth, died from pneumonia. The mother admitted giving the infant cardiopulmonary resuscitation several times during the 2 days before the infant's death. In one family 5 children died of pneumonia before the age of 20 months, 3 before the study period. Although this raises the possibility of genetic disorders such as cystic fibrosis, immune deficiency, or asthma, many such conditions have a good prognosis with treatment. Their mother was a nurse before joining a church with doctrinal objections to medical care.

One father had a medical degree and had completed a year of residency before joining a church opposed to medical care. After 4 days of fever, his 5-month-old son began having aperiodic episodes. The father told the coroner that with each spell he "rebuked the spirit of death" and the infant "pursed right back up and started breathing." The infant died the next day from bacterial meningitis.

For the children with tumors, available medical care would have given them a reasonable chance for long-term survival and reduction of pain and suffering. A 2-year-old boy with Wilms' tumor had a primary that weighed 2.5 kg, approximately one sixth of his body mass. A 12-year-old girl was kept out of school for 7 months while the primary osteogenic sarcoma on her leg grew to a circumference of 41 inches and her parents relied solely on prayer. A timely diagnosis would have allowed at least a modest chance for survival.

### Prenatal and Perinatal Fatalities

Table 3 lists the principal causes of 59 prenatal and perinatal deaths. All but 1 of the newborns would have had a good to excellent expected outcome with

TABLE 1. Classification of Expected Outcomes With Preventive or Remedial Medical Care

Classification	Criteria
Excellent	90% expected survival
Good	50%-89% expected survival
Fair	10%-49% expected survival
Some benefit	<10% expected survival but expectation for pain and suffering reduction under medical care
No benefit	No significant improvement in outcome expected with medical care

TABLE 2. Child Mortality Associated With Religion-motivated Medical Neglect

Diagnosis	N	Age (Years Unless Specified)	Expected Outcome
<b>General or miscellaneous:</b>			
Choking, gastric aspiration	1	9	Excellent
Dehydration	6	4 mo, 5 mo, 1, 5, 8, 12	Excellent
Diabetes, type 1	12	3, 7, 10, 10, 11, 12, 12, 13, 13, 14, 15, 16	Excellent
Epilepsy, withheld medication	1	17	Excellent
Scum, 50% total bean sprout soup	1	1	Good
Hydrocephaly, shunt/misdiagnosis	1	2 mo	Excellent
Foreign body aspiration	1	2	Good
Brain tumor	3	15, 15, 15	Excellent
Trauma, motor vehicle accident	1	2	No benefit
<b>Infections</b>			
Diphtheria	3	3, 4, 9	Excellent
Laryngotracheobronchitis	1	18 mo	Excellent
Meningitis (with complications)	7	1, 3, 4, 9, 13, 14, 16	Excellent
Meningitis, <i>H. influenzae</i>	9	4 mo, 1 (7), 4	Excellent
Meningitis, <i>S. pneumoniae</i>	4	2 mo, 5 mo, 1, 7	Excellent
Meningitis, bacterial, unspecified	1	1	Excellent
Meningitis, pneumococcal	1	15	Excellent
Pneumonia, <i>S. pneumoniae</i>	1	1	Excellent
Peritonitis	1	1 mo	Excellent
Pneumonia (varying etiologies)	22	1 mo to 2 y	Excellent
Peritonitis/myocarditis	1	1	Good
Rocky Mountain spotted fever	1	4	Excellent
Teak shank syndrome, streptococcal	1	17	Excellent
<b>Abdominal surgical disorders</b>			
Intussusception	3	8 mo, 9 mo, 14	Excellent
Appendicitis, ruptured	7	5 to 14	Excellent
Small bowel obstruction	1	6	Excellent
Strangulated hernia	1	6	Excellent
Volvulus	1	9 days, 26 mo	Excellent
<b>Cardiac heart lesions</b>			
Common atrioventricular canal	1	7 mo	Good
Double outlet right ventricle	1	12	No benefit
Ventricular septal defect, pneumonic	2	9 mo, 10 mo	Excellent
<b>Tumors</b>			
Berg's sarcoma	1	13	Good
Leukemia, acute lymphocytic	3	4, 4, 7	Good
Leukemia, unspecified	1	2	Fair
Lymphoma, Burkitt's	1	13	Good
Lymphoma, non-Hodgkin's	1	3	Good
Neuroblastoma	1	1	Fair
Osteogenic sarcoma	3	6, 12, 14	Fair
Posterior fossa, unspecified	1	2	Fair
Rhabdomyosarcoma	2	4 and 5	Fair
Wilms' tumor	1	2	Good
Total	113		

medical care. The mothers generally declined prenatal care and the deliveries were either unassisted or attended by nonlicensed midwives. Two mothers had prior cesarean sections and had been advised against home delivery. Siblings of 2 deceased newborns had previously received court-ordered medical care for illness or injury. In one case, a relative of an infant with respiratory difficulty called for medical assistance, but a church elder turned the responding emergency crew away saying that with prayer the infant was breathing better. The infant died within a few hours. One infant was asphyxiated because of intrapulmonary bleeding, which might have been prevented with a routine vitamin K injection.

Prayer was sometimes offered along with medical care. During 1 birth, a 3-day ordeal that included difficult labor and maternal convulsions, the founding elder of the sect told the mother her copious green vaginal discharge was "a good thing," a sign that she had peritonitis and poisons were being expelled thanks to the prayers of the group. It is likely that her discharge was meconium, a sign of fetal distress.

Deliveries attended by unlicensed midwives had tragic results. In one case, a 23-year-old woman presented to an emergency room after 56 hours of active labor with the infant's head at the vaginal opening for >16 hours. The dead fetus was delivered via emergency cesarean, and was in an advanced state of decomposition. The mother died within hours after delivery from sepsis because of the retained uterine contents. The medical examiner noted that the corpse of the infant was so foul smelling that it was inconceivable anyone attending the delivery could not have noticed.

Five additional mothers of perinatal infants died from complications of delivery. A few mothers eventually were treated in emergency departments for vaginal lacerations and retained placentas. In 2 cases, dead newborns had twin siblings who survived after being taken to hospital.

#### Other findings

A total of 23 denominations from 34 states were represented in this study. Five groups accounted for

TABLE 3. Perinatal Fatalities Associated With Religion-motivated Medical Neglect

Diagnosis	N	Comments	Expected Outcome
<b>Fetal demise</b>			
Preterm	3	26-, 33-, 34-week gestations	Good
Term	6	Large infants, some postterm	Excellent
Hydrops fetalis	1	Blood group incompatibility (All over 20 weeks unless noted)	Excellent
<b>Preterm infants</b>			
Apnea, respiratory arrest	1		Excellent
Asphyxia	1	Neckal cord, breech	Excellent
Intraventricular hemorrhage	1	34-week gestation	Good
Pre-eclampsia, severe	1	400 g, 1 month maternal bleeding	Good
Respiratory distress syndrome	6	30- to 34-week gestations	Excellent
Respiratory failure, unspecified	3	Several lived more than a day at home	Excellent
Sepsis/mis. seps	1		Excellent
Traumatic delivery	1	Subarachnoid hemorrhage	Excellent
<b>Term infants</b>			
Anomophaly, myelomeningocele	1		No benefit
<b>Asphyxia</b>			
unspecified	8	Several failed unskilled resuscitations	Excellent
breech	6		Fair/Good
maternal shock	1		Excellent
neckal cord	2		Excellent
prolonged labor	6	From 2 in 4 days	Excellent
unclaved occipitals	2		Excellent
Birth trauma	5	Internal and external head injuries	Excellent
Hemorrhagic disease of newborn	1	Pulmonary hemorrhage, lived 6 days	Excellent
Hypothermia, shock	1		Excellent
Meconium aspiration	2		Excellent
Respiratory failure	3		Excellent
<b>Total</b>	<b>59</b>		

83% of the total fatalities (Table 4). Several states had totals disproportionate to population. There were 50 from Indiana, home of the Faith Assembly. Pennsylvania had 16 fatalities, including 14 from the Faith Tabernacle. The Church of the First Born accounted for the majority of 15 deaths in neighboring Oklahoma and Colorado. In South Dakota there were 5 deaths from the First Time Ministries. Nationwide, the Christian Science church had 28 deaths in the study.

Contacts with public agencies and mandated reporters of suspected child neglect were not unusual among the children. Believing they were powerless in the face of the parents' wishes, some teachers ignored obvious symptoms and sent lessons home to bedridden children. Some social workers and law enforcement officers allowed parents to decline examinations of children reported to be ill. Public officials did not investigate the deaths of some children.

One teenager asked teachers for help getting medical care for fainting spells, which she had been refused at home. She ran away from home, but law enforcement returned her to the custody of her father. She died 3 days later from a ruptured appendix.

A premature girl was delivered successfully at a hospital after her twin brother died during a home

birth. Her mild respiratory distress syndrome resolved after 4 days of oxygen and other minimally invasive support. She then developed progressively severe apneic spells. The medical staff acquiesced to the parents' request not to transfer the child to a higher level unit, despite an expected good prognosis. She died 7 days later when she could not be resuscitated after a respiratory arrest.

#### DISCUSSION

Calculations of overall incidence and mortality rates are not possible in this study as the number of children in the groups sampled is not available and the cases were collected in a nonrigorous manner. However, we think that the comparison with outcomes expected in ordinary medical settings is a valid indicator that death and/or suffering were preventable in virtually all of these children. These fatalities were not from exotic entities but ordinary ailments seen and treated routinely in community medical centers. Deaths from dehydration, appendicitis, labor complications, antibiotic-sensitive bacterial infections, vaccine-preventable disorders, or hemorrhagic disease of the newborn have a very low frequency in the United States.

We suspect that many more fatalities have occurred during the study period than the cases reported here. Deaths of children in faith-healing sects are often recorded as attributable to natural causes and the contribution of neglect minimized or not investigated. During the course of requesting documents for this study, we were told of deaths of children because of religion-motivated medical neglect that were not previously known to us from public records, newspapers, or other sources.

In many jurisdictions the classification of stillborn for an infant who has not taken a breath precluded

TABLE 4. Religious Groups With Case Reports of Medical Care Avoidance

Organization Name	Deaths
Church of the First Born	29
First Time Ministries	12
Faith Assembly	64
Faith Tabernacle	16
First Church of Christ, Scientist (Christian Science)	28
Other denominations (N = 12), or unaffiliated	30
<b>Total</b>	<b>172</b>

investigation of individuals involved in unattended deliveries, including unlicensed midwives.

The legal requirements for care of infants who have begun breathing are also inadequate in some states. One Indiana jury acquitted parents who let their 9-hour-old, preterm infant die without medical help. The judge instructed the jury that state law did not require the parents to obtain hospitalization until the infant had stopped breathing. Because survival after out-of-hospital cardiopulmonary arrest of infants is generally poor, such a law effectively obviates a duty to provide care.

In 1983, the federal government removed religious exemptions from federal mandates, allowing states to repeal them. The well-organized lobbying of exemption supporters, however, has defeated most repeal efforts. Today only five states, Massachusetts, Maryland, Nebraska, North Carolina, and Hawaii, have no exemptions either to civil abuse and neglect charges or criminal charges. The law and politics of this issue are discussed extensively elsewhere.<sup>13,28-31</sup>

Twenty-six percent of the deaths in this study have occurred since 1988, when the American Academy of Pediatrics first called for elimination of religious exemption laws<sup>11</sup> and several years after the federal government began allowing repeal. Excluding the Faith Assembly in which high reported maternal and child death rates declined after some prosecutions<sup>22</sup> and the death of its charismatic leader, 35% of the fatalities in this sample occurred from 1988 to 1995, 38% of the study period. Thus, it seems that this form of preventable child mortality continues unchecked.

From our observation, religious exemption laws promote the assumption that parents have the right to withhold necessary medical care from their children on religious grounds. Mandated reporters have been discouraged from contacting authorities or are unaware of their obligations and of means for state intervention. State agencies have sometimes hesitated to act on reports they do receive. Whereas Christian Science church leaders advise members in Britain and Canada to obey laws requiring medical care of sick children,<sup>32,33</sup> they have advised US members that the laws allow them to withhold medical care.<sup>34,35</sup> Several Pentecostal clergy and parents have also claimed that exemption laws confer the right to deny medical care to children.<sup>36</sup>

The American Academy of Pediatrics, American Medical Association, National District Attorneys Association, and National Committee for the Prevention of Child Abuse, among others, have adopted policy statements calling for the complete repeal of religious exemptions in child abuse and neglect and criminal statutes.<sup>10-11</sup> The children of members of faith-healing sects deserve the same protections under the law as other children have. We believe that the repeal of exemption laws is a necessary step toward assuring such protection and should be accomplished before hundreds more children suffer needlessly and die prematurely.

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# Children's Healthcare Is a Legal Duty, Inc.

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July 2, 1998

Professor Marci Hamilton  
Benjamin N. Cardozo Law School  
55 Fifth Avenue  
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Dear Professor Hamilton:

Our organization, CHILD Inc., is happy to respond to a question by Senator Michael DeWine, R-Ohio, about whether the Religious Liberty Protection Act (RLPA) would weaken child health and safety laws. CHILD Inc. and the American Professional Society on the Abuse of Children filed an amicus curiae brief in *Boerne v. Flores*, 117 S. Ct. 2157 (1997), which argued that the Religious Freedom Restoration Act (RFRA) compromises due process and equal protection rights of children. There is no doubt that RLPA, like its predecessor RFRA, would hamper governmental efforts to protect and support children.

As Justice Sandra O'Connor said in *Boerne v. Flores*, "Requiring a state to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."

RLPA creates a new federal cause of action. It gives parents the right to sue in federal court school districts, child protection agencies, et al., raising claims of improper state interference with their religious practices and putting the burden on the government to demonstrate compelling interest and least restrictive means.

In promoting costly litigation, RLPA will take away scarce resources from states and could intimidate state agencies from taking actions that might lead to litigation.

CHILD Inc. believes that RLPA would have several deleterious effects on the health and safety of children. Requiring the state to use the least intrusive means limits the remedies the state may employ to protect children. It calls into question all criminal child abuse laws. The Christian

Science church, for example, argues that parents who withhold lifesaving medical care from children on religious grounds should be immune from criminal charges because child protection services intervention is less restrictive of religious practice.

A California Christian Science mother who let her daughter die of meningitis without medical care was convicted of manslaughter in 1990. She then filed a writ of habeas corpus petitioning a federal district court to overturn her conviction on due process grounds. She also argued "that her rights under the Religious Freedom Restoration Act (RFRA) were violated because criminal prosecution was not the least intrusive means to protect the state's compelling interest in the welfare of children." The Court said her argument had "persuasive force" and overturned her conviction, but did not reach her claim on RFRA. *Walker v. Keldgard*, U.S. Dist. Ct., Eastern Dist. of Calif. #CIV S-93-0616 LKK JFM P.

RLPA's provision that the state must have a compelling interest before restricting religious freedom may also compromise state laws for the protection of children. Some commentators have suggested that states will be obligated to enact religious exemptions to all preventive and diagnostic measures, such as immunizations, metabolic testing, hearing and vision tests, other physical examinations, and prophylactic eyedrops, and that only when the child is sick will the state have a compelling interest in requiring health care to which parents raise religious objections.

RFRA and RFRA-like provisions in state law have already hindered state efforts to collect child support. In *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994), the court held that where the non-supporting father was a member of a church that prohibited support of children who lived outside of the closed religious community, the contempt citation must be dismissed because RFRA required that the state confine its means for collecting support to the least restriction on religious practice.

In 1998 a Minnesota Appeals Court reversed a child support award because the Minnesota Constitution has been interpreted to include a provision like RFRA. The Court held that the father who was a member of a religious commune could not have income imputed to him for purposes of calculating a child support award, as in all other cases of voluntary underemployment. The decision adversely affected the collection of support by the public assistance agency who provided support to the mother and children. *Murphy v. Murphy*, 574 N.W.2d 77 (Minn.App. 1998).

Another problem with RLPA is that it requires the religion of private parties to be den., cert. den. 116 S.Ct. 814, a wrongful death tort action was brought against a Christian Scientist and her hired spiritual treatment providers for withholding medical care and allowing her 11-year-old son to die of untreated diabetes. The Minnesota Court of Appeals applied "a standard of care taking account of 'good-faith Christian Scientist' beliefs rather than an unqualified 'reasonable person standard'" because "the religious belief would be burdened by the [tort standard]. *Id.*, at 827-28 and 818.

Under RLPA the same result would be compelled in all courts. The United States Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 255 (1964), that the application of rules of law in private civil action is government action for purposes of constitutional protections. The result is that the fundamental constitutional right to life of all children in the custody or care of spiritual treatment providers and the constitutional right to have their disputes adjudicated under religiously neutral principles of law guaranteed by the equal protection and due process clauses of the Fourteenth Amendment, would be violated by RLPA.

Under RLPA juries would be required to consider the religious beliefs of plaintiffs and defendants to determine liability in disputes between private parties. While RLPA provides that the state may limit a religious practice to protect a compelling state interest, it would be difficult and perhaps impossible to show that the state has a compelling interest in the outcome of disputes between private parties, thereby eliminating the child's right to a judicial forum in cases where children have died or been maimed as a result of religious practices.

Child advocates' worst fears about RFRA have already come true in *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214 (Colo. Ct. App. Jan. 5, 1995) (as modified on denial of rehearing) cert. pending. In a minor's suit against a church counselor and church for alleged inappropriate touching and other tortious conduct, the Court rejected the defendants' argument that, under the evidence presented below, liability could not be imposed without offending the Free Exercise Clause. However, the Court also ruled that, if the evidence was essentially the same on retrial, the jury should be instructed to rule for the defendants if it determined the counselor's conduct was based on sincere religious beliefs. A concurring judge noted that RFRA "modifie[d] state tort law pursuant to Congress' power to enforce the [14th] Amendment legislatively," and that "allowing a tort remedy without, at a minimum, a jury instruction allowing deference to religious belief, would substantially burden the counselor and church's free exercise" and that "without such an instruction, there is no compelling state interest here to allow plaintiffs to pursue a tort remedy.

The federal government already discriminates against children associated with faith-healing sects by allowing them to be deprived of legal protections extended to other children. The Child Abuse Prevention and Treatment Act (CAPTA) requires that states in the grant program include "failure to provide medical care" in their definitions of child abuse and neglect. *Federal Register* 26 Jan. 1983, Part 1340.2(3)(i), page 3702. But CAPTA as reauthorized in 1996 includes the provision, "Nothing in this Act shall be construed as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian. . . ." PL 104-235, Sec. 112

Thus, CAPTA allows states to deprive one class of children of a protection that it requires the states to have in place for all other children.

The April issue of *Pediatrics*, the peer-reviewed scientific journal of the American Academy of Pediatrics, has an article reviewing 172 deaths of U. S. children in faith-healing sects between 1975 and 1995. Seth Asser and Rita Swan, "Child fatalities from religion motivated medical neglect," *Pediatrics* 101 (April 1998): 625-9. The authors found that 140 of the deaths were from conditions for which survival rates with medical care would have exceeded 90%.

After the article was published, *The Oregonian* newspaper reported that 78 children have died since 1955 in one local congregation with religious objections to medical care and 12 children in an Idaho affiliate. Mark Larabee and Peter Sleeth, "Faith healing raises questions of law's duty—belief or life," *The Oregonian* 7 June 1998: 1. None of these cases was known to Asser and Swan when they published their research in *Pediatrics*. Both Oregon and Idaho have religious defenses to crimes against children, and charges were not filed in any of these 90 deaths.

State laws are already weakened by a plethora of religious exemptions from parental duties of care. We urge Congress not to enact RLPA, which will compound the endangerment, abuse, and neglect of children on religious grounds.

Sincerely,

*Rita Swan*

Rita Swan

**Responses of ,PROFESSOR EISGRUBER to Questions from SENATOR HATCH.**

1. Has Congress not frequently imposed general conditions on the receipt of federal funds, such as the requirement in Title VI that no program receiving federal funds may engage in racial discrimination? How is RLPA, insofar as it relies on the Spending Clause, any different?

RESPONSE: RLPA differs from Title VI in two crucial respects. First, under South Dakota v. Dole, 483 U.S. 203 (1987), Congress may impose conditions upon the receipt of federal funds only if those conditions are related "to the federal interest in particular national projects or programs." (internal quotations omitted). Because Title VI is an anti-discrimination measure, it bears an obvious relationship to the goals of every federal spending program. Congress has an interest in seeing that all persons are able to participate fairly and equally in federal programs. Title VI facilitates that goal. Title VI therefore satisfies Dole's nexus requirement: it bears a relationship to the federal interest in national projects and programs.

No comparable claim can be made on behalf of RLPA. RLPA is not an anti-discrimination statute. It does not ensure that all Americans will be able to participate in federally funded programs on equal terms; on the contrary, it creates special privileges for some religiously motivated participants and denies those privileges to participants with interests that are non-religious but equally dignified and important. (For example, RLPA may entitle religiously motivated parents to exempt their children from curricular programs which they find morally objectionable, while denying any comparable privilege to parents whose objections are equally conscientious, but non-religious).

Second, because Title VI is an anti-discrimination statute, it does not tell us anything about the scope of congressional power under the Spending Clause. Title VI is fully defensible as an exercise of the power granted Congress by Section Five of the Fourteenth Amendment. Title VI would therefore remain constitutional even under very restrictive readings of the Spending Clause (readings much more restrictive, for example, than the Supreme Court's decision in South Dakota v. Dole). The fact that Congress has the power to enact Title VI does not permit one to draw any conclusions about the scope

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of congressional power under the Spending Clause.

2. Professor Hamilton objects to the RLPA as ultra vires under the Spending and Commerce Clauses, citing Boerne. Professor Hamilton, could you explain what the Boerne decision has to do with whether RLPA is a legitimate exercise of Congress' Commerce Clause or Spending powers? Are "proportionality" or "congruence" relevant to the limits of Congress' power to regulate commerce or to put limits on the use of federal funds?

RESPONSE: Although this question is addressed to Professor Hamilton, I would like to accept Senator Hatch's invitation to comment upon it.

Obviously, Boerne dealt with the scope of congressional power under Section Five of the Fourteenth Amendment, not under the Spending Clause or the Commerce Clause. Nevertheless, Professor Hamilton is correct when she asserts that the Court's conclusions in Boerne are relevant to issues that will inevitably arise under both the Spending Clause and the Commerce Clause.

The connection arises in the following way. In Boerne, the Court did not simply find that RFRA's "compelling state interest test" lack "proportionality" and "congruence" to the goal of enforcing the Fourteenth Amendment. Its conclusions included a more specific finding: the "compelling state interest test" lacked "proportionality" and "congruence" to the goal of preventing discrimination against religion (including disparate impact discrimination).

That conclusion is relevant to both Commerce Clause and Spending Clause analysis of RLPA. The Court has insisted that requirements imposed under the Spending Clause must have an adequate nexus to the federal interest in particular national projects and programs, South Dakota v. Dole, 483 U.S. at 207. Likewise, the Court has insisted that regulations imposed pursuant to the Commerce Clause must have an adequate nexus to federal interests in interstate commerce, United States v. Lopez, 115 S. Ct. 1624, 1629 (1995). Statutes that prohibit discrimination bear an obvious relationship to federal interests

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under both the Spending Clause and the Commerce Clause. Anti-discrimination statutes facilitate Spending Clause interests because they allow all persons to participate in federal programs on fair and equal terms. Such statutes facilitate Commerce Clause interests because they promote free markets: they ensure that all persons (regardless of race, religion, or ethnicity) can compete on a level playing field.

Because Congress clearly has authority to enact anti-discrimination statutes under both the Commerce Clause and the Spending Clause, RLPA's proponents have attempted to analogize it to such statutes. Boerne makes clear, however, that this analogy is defective. RLPA's use of the "compelling state interest" test, like RFRA's, bears no reasonable relationship to the goal of preventing discrimination--whether that goal is pursued under the mantle of Section Five of the Fourteenth Amendment, or the Spending Clause, or the Commerce Clause.

3. Could each of you explain what you believe is the test, in your view, for determining whether this legislation is a legitimate exercise of Congress' power under the Commerce Clause? What case law support is there for your interpretation of the Commerce power?

RESPONSE:

The Court's leading Commerce Clause precedent is United States v. Lopez, 115 S. Ct. 1624 (1995). In Lopez, the Court emphasized that a "'general regulatory statute'" is defensible under the Commerce Clause only if it "'bears a substantial relation to commerce . . .'" Id. at 1629, quoting Maryland v. Wirtz, 392 U.S. 183, 197, n. 27). To make this principle concrete, the Court identified "three broad categories of activity that Congress may regulate under its commerce power." The first two categories cover only laws with either "regulate the use of the channels of interstate commerce," or "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Ibid. These categories apply to laws which regulate (for example) highways, interstate

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telecommunications, shipping companies, interstate packages and interstate travellers. RLPA sweeps too broadly to fit within either of these categories.

RLPA's constitutionality therefore depends upon the third and final category identified by the Lopez Court. The Court described that category as follows: "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. This is the broadest of the three headings of congressional power under the Commerce Clause. As the Lopez Court acknowledged, "the de minimis character of individual instances arising under the statute is of no consequence" provided that the sum of all such instances, considered in the aggregate, has a substantial effect upon interstate commerce. 115 S. Ct. at 1629, citing Wirtz, 392 U.S. at 197, n. 27. The Court has accordingly upheld a wide range of statutes that regulate, among other things, "intrastate coal mining; . . . intrastate extortionate credit transactions; . . . restaurants utilizing substantial interstate supplies; . . . inns and hotels catering to interstate guests; and production and consumption of home-grown wheat." 115 S. Ct. at 1630.

The Lopez Court made clear that this category of congressional authority, although broad, is not unlimited. Lopez involved the constitutionality of the Gun Free School Zones Act of 1990. That Act made it a crime for individuals to possess a firearm within 1000 feet of a school. The Justice Department defended the Act on the ground that the possession of guns near schools substantially affected interstate commerce. The Department argued, for example, that the possession of guns near schools would interfere with education, and that poorly educated students would be less likely to make valuable contributions to the interstate economy. The Lopez Court rejected this rationale, and others like it, on the ground that they piled "inference upon inference in a manner that would bid fair to convert congressional

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authority under the Commerce Clause to a general police power of the sort retained by the States." Id. at 1634.

How would RLPA fare under Lopez? In my view, RLPA exceeds the scope of congressional authority much more egregiously than did the Gun Free Schools Zone Act. RLPA does not reflect any articulable concern about interstate commerce. Congress' purpose is not, for example, to encourage churches and religious persons to participate more extensively in interstate commerce. Nor is Congress concerned that churches are harmed by the effects of interstate commerce. Nor has anybody suggested any reason to believe that states are trying to exclude churches from commercial intercourse, or that states are more likely to discriminate against those churches that happen to be involved in commercial activities. Nor, finally, is RLPA comprehensible as an effort to promote interstate commerce; RLPA protects any religious conduct that affects interstate commerce, even if it affects such commerce adversely (such as might be the case with, for example, religiously motivated boycotts and labor actions).

In sum, the point of RLPA is to promote religious conduct, and to do so regardless of what effect that conduct has upon commerce, or commerce upon it. The connection between religious activity and commerce is being used as a constitutional excuse for a regulatory program which Congress wishes to enact for reasons having nothing at all to do with commerce. The nexus between RLPA and legitimate Commerce Clause goals is thus weaker than the nexus between the Gun Free School Zones Act and legitimate Commerce Clause goals.

Moreover, RLPA's Commerce Clause provisions sweep much more broadly than did the Gun Free School Zones Act. Those provisions have the potential to invade nearly every imaginable domain of local government. For example, the law would affect zoning (insofar as church activities substantially affect interstate commerce), education (insofar as public and private schools substantially affect interstate commerce), and family law (insofar as separation decrees and child

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support orders substantially affect interstate commerce). To the extent that the Court is worried about "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States," Id. at 1634, RLPA poses this threat much more vividly than did the Gun Free Schools Zone Act.

RLPA's defenders do not really claim that its goals have anything to do with commerce. Nor do they deny that RLPA amounts to a sweeping invasion of traditionally local domains. Instead, they suggest that RLPA's jurisdictional proviso will save the statute. Section 2(a)(2) limits RLPA's application to religious exercise "in or affecting commerce." The Gun Free Schools Zone contained no comparable stipulation. The Lopez Court drew attention to this fact; the Court pointed out that the Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 115 S. Ct. at 1631.

Surely, though, the requirements imposed by Lopez are not so formal and hollow as to be circumvented in this way. Suppose, for example, that the Gun Free School Zones Act had applied only to possession of a gun within 1000 feet of a school "substantially affecting interstate commerce." Would that have been sufficient to save the Act? It seems unlikely, to say the least. A jurisdictional proviso will bring a statute within the scope of the Commerce Power only if it creates a reasonable relationship between the goals of the statute and the goals of the Commerce Clause. The statute in Lopez contained no jurisdictional proviso whatsoever; the Court accordingly had no occasion to analyze which provisos would create an adequate nexus between a challenged statute and the goals of the Commerce Clause. It would be a mistake to think that boilerplate references to commerce give Congress a free hand to regulate can save an otherwise unconstitutional statute.

RLPA's defenders have lost sight of the general principle underlying the doctrinal framework articulated in Lopez: to be a legitimate

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exercise of the Congress power, a statute's general regulatory scheme must "bear a substantial relation to commerce." 115 S. Ct. at 1629. In the case of RLPA, it is impossible to imagine, much less substantiate, any such relationship. Religious conduct varies tremendously and unpredictably. From the standpoint of interstate commerce, religious activity is a random vector. There is no reason to believe that it promotes, diminishes, obstructs, or facilitates interstate commerce. Nor is there any reason to think that requiring government to accommodate religion would have any predictable effect whatsoever upon interstate commerce.

Common sense confirms these conclusions. Consider the odd effects that would flow from RLPA's pretextual use of the Commerce Clause. Religions involved in interstate commerce would be able to claim exemptions not available to other religions. As a result, churches would have an incentive to initiate small-scale commercial activities (such as, for example, an interstate mail-order catalogue of inspirational books). By integrating such commercial enterprises into their other activities, churches could trigger RLPA's Commerce Clause provisions, and provide themselves with legal rights they would not otherwise enjoy. It is absurd to give churches incentives of this kind, and it is unfair to discriminate among churches depending upon whether they engage in substantial amounts of commerce. Yet, RLPA would have both of these consequences. Is that really something this Congress wants to do? I hope not; in any event, I am quite confident that if Congress tries, the Supreme Court will bar the way.

4. Professor Eisgruber objects to the burden-shifting provision of Section 3(a) of the bill as "attempt[ing] to deprive the courts of the authority to interpret the Constitution" and as specifying a "rule of decision" for the courts. Professor Hamilton objects to provisions of S. 2148 on the basis of Marbury v. Madison, presumably for similar reasons. How can that be, given that the bill requires a showing of constitutional violation under the courts' current jurisprudence and leaves the ultimate legal standards and decisions to the courts?

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RESPONSE: I believe that it is misleading to say that Section 3(a) "leaves the ultimate legal standards and decisions to the courts." As every lawyer knows, procedural burdens may determine outcomes. Section 3(a) purports to alter the burden of persuasion on constitutional claims; the effect is no different than if the Section created a new substantive standard more generous to plaintiffs.

5. Is the burden-shifting provision of 3(a) not wholly consistent with other civil rights laws?

RESPONSE: Section 3(a) differs from many civil rights statutes in the following respect. It does not create a new, statutory cause of action, and then specify burdens of persuasion under the statute. Instead, it purports to dictate the burdens that will apply to litigation conducted under the Constitution itself.

6. Assuming that the subject matter regulated by RLPA is within Congress' power to regulate under the Commerce and Spending Clauses, do you really think there is an independent separation of powers problem with this bill?

RESPONSE: I do not believe that RLPA (or any other bill) is rendered unconstitutional merely because it flows from a disagreement between Congress and the Supreme Court about what Constitution means. Congress is permitted to (indeed, obliged to) exercise its own, independent constitutional judgment when deciding how to exercise the powers granted it by the Constitution.

On the other hand, I do believe that RLPA suffers from other, more subtle defects which, in my view, should be characterized as "separation of powers" problems. For example, in my view the burden-shifting provisions discussed in the last two paragraphs involve "separation of powers" problems.

My co-author and I have described other "separation of powers" problems which infect RFRA, and which would infect RLPA as well. See, e.g., Christopher L. Eisgruber and Lawrence G.

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Sager, Congressional Power and Religious Liberty  
After City of Boerne v. Flores, 1997 S. Ct. Rev.  
79, 135-36.

7. If the answer to the above question is "yes," do you think Congress has power to impose a compelling-interest test within those areas governed by its enumerated powers, and not with the intent to "overrule" or "second-guess" the Supreme Court's decision in Smith? If so, why should the constitutionality of our legislation turn on our intent in passing it?

RESPONSE: I do not believe that the constitutionality of RLPA (or any other statute) turns upon whether Congress intends to "second-guess" the Court. RLPA's problems flow principally from its use of the "compelling state interest test." RLPA would suffer from these problems regardless of whether Congress intended to "second-guess" Smith.

8. Professor Hamilton, in response to a question about whether the test of constitutionality was Congress' motivation, drew a distinction between Congress' motivation and the legislation's purpose and asserted that this difference was grounded in case law. What is this case law, and do any of the rest of you see the same distinction? What is the proper test of constitutionality, legislative motive, purpose, a structural/power inquiry, or something else?

RESPONSE: I am not inclined to think that distinctions among purpose, motive, or "structural/power inquiry" help us to understand the constitutional issues posed by RLPA.

9. Professor Hamilton asserts that RLPA violates Article V's ratification provisions. This would suggest that Congress can do no legislating in constitutional subject matter areas beyond the minimum constitutional requirements. But does that reading not undermine Professor Hamilton's and Professor Eisgruber's allowance that Congress could adopt some religion-protection legislation, just not this? And does not that reasoning also suggest that a whole host of civil rights legislation is constitutionally suspect since protections for many groups under federal legislation goes beyond the mere constitutional requirements?

RESPONSE: I do not feel able to comment upon

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whether Professor Hamilton's view has any of the consequences ascribed to it by this question. In any event, I am not myself committed to any view which would prohibit Congress from "legislating in constitutional subject matter areas beyond the minimum constitutional requirements."

10. The Supreme Court has signaled that it is willing to enforce limits on federal power. But do the Printz, Lopez, and New York v. United States cases stand for the proposition that Congress cannot displace or preempt state laws, or lift the burdens of state laws? How does S. 2148 relate to these cases?

RESPONSE: Neither Printz nor Lopez nor New York bars Congress from preempting state law. Lopez is a Commerce Clause case; it is highly relevant to RLPA's constitutionality, and I discuss it in my answer to your third question. I do not believe that Printz and New York create any additional, independent problems for RLPA.

11. Could each of you state your understanding of how S. 2148 accords with the Seminole Tribe case regarding state sovereign immunity?

RESPONSE: I do not consider myself an expert on the Court's rather complex Eleventh Amendment jurisprudence. Insofar as I can tell, however, S. 2148 is consistent with the doctrinal limits laid down in Seminole Tribe.

12. Could each of you explain why the special rules regarding land use are or are not consistent with the Boerne decision? If not, what kind of record would be necessary to make it so?

RESPONSE: Section 3(b)(1) purports to invoke Congress' power to enforce the Fourteenth Amendment. In Boerne, the Court held that legislation of this kind must be "congruent" and "proportionate" to the goal of providing remedies for constitutional rights recognizable to the Court. Section 3(b)(1)(A) is clearly inconsistent with this standard.

Section 3(b)(1)(A) prohibits governments from enforcing land use ordinances which "substantially burden religious exercise, unless

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the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety." Protecting public health, promoting safety, and preventing property damage are all compelling state interests. Section 3(b)(1)(A) therefore imposes the compelling state interest test under a different name.

The effect of the compelling state interest test is to create a strong presumption of unconstitutionality. The test is "congruent" and "proportionate" to the goal of remedying rights violations only when almost all of the fact patterns which trigger the test's application are abhorrent to constitutional standards of government behavior.

In order to render Section 3(b)(1)(A) constitutional under Boerne, Congress would have to compile a record demonstrating that it is reasonable to presume that every zoning ordinance which substantially burdens religion is the product of discrimination or hostility or insensitivity toward religion. It might be possible to support this presumption with regard to some limited subclass of zoning decisions. But the presumption is obviously false in general, and Section 3(b)(1)(A) would be unconstitutional in most of its applications.

I have no objection to Sections 3(b)(1)(B) and 3(b)(1)(C), although I think they probably duplicate rights which are already protected by Supreme Court doctrine.

13. Both Professors Hamilton and Eisgruber suggest that somehow targeted exemptions for particular religions in particular situations would somehow be more appropriate than a general accommodation of religion across the board. It seems to me that such an individualized approach to religious accommodation is the worst possible option. Religions with enough political influence may succeed in obtaining religious accommodations, but unpopular minority religions are unlikely to be successful. Isn't approaching the issue of religious accommodation on a statute-by-statute basis, rather than through a general rule, much more likely to have the effect of discriminating between religions and thereby exacerbating

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rather than minimizing Establishment Clause concerns? Would not such targeted accommodations be more suspect under Board of Education v. Grumet and Estate of Thornton v. Caldor than a general non-discriminatory accommodation rule?

RESPONSE: "The only sensible way to review legislative accommodations for religious practice under the Establishment Clause is to ask whether they are reasonable prophylactic measures to guard against otherwise unreachable instances of discrimination, hostility, or insensitivity to religious belief." Christopher L. Eisgruber and Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 S. Ct. Rev., at 133. Such "reasonable prophylactic measures" might take either of two possible forms. They might take the form of "narrow exemptions crafted to target probable instances of discrimination." *Id.*, at 135. Or they might take the form of a mild, across-the-board standard (such as the "reasonable accommodation" standard, or the O'Brien test) which would enable courts to identify hidden instances of discrimination and insensitivity without granting religion any special privileges. The problem with the compelling interest standard is not simply that it is abstract and general, but that it is unreasonably demanding--and so creates special privileges, rather than protecting religious interests against discrimination, hostility, and insensitivity.

The Supreme Court has adopted precisely this approach to distinguish between permissible and impermissible accommodations. In Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987), the Supreme Court upheld provisions exempting churches and other religious employers from the scope of federal law prohibiting discrimination on the basis of religious belief. It is easy to understand the Court's decision. If a local diner hires only Catholics to serve coffee and flip burgers, we can be confident that unfair discrimination and perhaps bigotry is at work; if, on the other hand, the local Catholic Church hires only Catholics as priests, we can understand this fact as essential to the creation of a working community of faith. Subjecting churches to laws

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that prohibit religious discrimination in the workplace would be insensitive to the special needs of religious persons and institutions. The law upheld in Amos was a "reasonable prophylactic measure to guard against otherwise unreachable instances of discrimination, hostility, or insensitivity to religious belief."

In Thornton v. Caldor, 472 U.S. 703 (1985), by contrast, the Supreme Court held unconstitutional a Connecticut law which gave all religious employees the right not to work on their Sabbath. The law in Thornton created special privileges. Many employees will have conscientious, non-religious reasons for wishing to stay home from work on particular days: for example, a single mother may find it easier to arrange child care on some days than on others. Unlike the law in Amos, the law in Thornton deals with a burden that applies equally to persons who are religiously motivated, and to those who are not. It therefore was not a reasonable prophylaxis against discrimination; instead, it created special privileges, and the Court rightly deemed it unconstitutional. See also Texas Monthly v. Bullock, 489 U.S. 1 (1989); Welsh v. United States, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

Your question seems to suppose that the exemption at issue in Thornton was objectionable because less "general," and more "targeted," than the one upheld in Amos. I fail to see this distinction. Both exemptions were general in the sense that they applied to all religions (they were not restricted to particular denominations); both exemptions were targeted in the sense that they applied to one particular practice (in Thornton, the practice of resting on the Sabbath; in Amos, the practice of discriminating on the basis of religious belief in the course of making employment decisions). The distinction between the two cases does not depend upon whether the exemption in question was "targeted" or "general"; the distinction depends upon whether the exemption is a reasonable mechanism for guarding against discrimination, hostility, or insensitivity to religious belief.

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I believe that targeted exemptions like the one in Amos are the most effective way for Congress and other legislatures to accommodate religious liberty (although, as I have said, I do not believe that such exemptions are the only permissible means of accommodation). Of course, when Congress crafts targeted exemptions, it cannot prefer "particular religions" at the expense of others. It would have been outrageous (and patently unconstitutional), for example, if Congress had exempted some religions, but not others, from Title VII's restrictions upon religious discrimination in the workplace.

Of course, it is possible that Congress and state legislatures will leave some burdens unredressed. Yet, I am surprised, Senator Hatch, by your assumption that you and your colleagues will respond only to "religions with enough political influence." As you are no doubt aware, you and your colleagues have responded better to the needs of minority religions than has the Supreme Court. For example, in Goldman v. Weinberger, 475 U.S. 503 (1986), the Court allowed the army to prohibit an Orthodox Jewish officer from wearing a yarmulke with his uniform; Congress responded by passing a law that accommodated the wearing of religious apparel in the military, 10 U.S.C. § 774 (1994). In Lyng v. Northwest Indian Cemetery Protective Association, the Court permitted the Forest Service to build a road through an Indian burial ground located on federal property; the House Appropriations Committee responded by withdrawing funding for the road. House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations Bill, 1989 H.R. Rep. No. 100-713, 100th Cong., 2d Sess. 72 (1988). And in Smith itself, even Justice O'Connor, who defended the "compelling state interest test," concurred in the Court's decision not to exempt Native American peyote rituals from state controlled substance laws; Congress responded by protecting such rituals from burdens imposed by state and federal law. 42 U.S. § 1996a (1994).

14. Is there any case-law support for the proposition that Congress can require religious accommodation statute-by-statute (for example, by granting religious exemptions from

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Title VII or by exempting Christian Scientists from Medicare/Medicaid) but cannot establish a general rule of religious accommodation without creating an establishment of religion? Is there case law support for the opposite conclusion?

RESPONSE: I believe that my answer to the preceding question also fully answers this one.

15. Professor Hamilton asserts that religious accommodation "is a zero-sum game" in that by protecting religious practice from general laws, Congress "inevitably subtracts from the liberty accorded other societal interests." [Hamilton statement, p. 4]. If this is true, is all accommodation invalid under the Constitution? What about legislative accommodations that have been upheld, or state constitutions or enactments that are more protective of religious free exercise; are they also unconstitutional?

RESPONSE: I do not believe that religious accommodation is a "zero-sum game." I do not know what conclusions would follow from that belief.

16. Professor Eisgruber, you suggest that there are more appropriate methods of protecting religious liberty than RLPA. What are they, and why are they not more objectionable under your analysis than RLPA?

RESPONSE: As I explained earlier, I believe that legislative accommodations are desirable and constitutionally permissible only if they are "reasonable prophylactic measures to guard against otherwise unreachable instances of discrimination, hostility, or insensitivity to religious belief." Christopher L. Eisgruber and Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 S. Ct. Rev., at 133. Such "reasonable prophylactic measures" might take either of two possible forms. They might take the form of "narrow exemptions crafted to target probable instances of discrimination." *Id.*, at 135. Or they might take the form of a mild, across-the-board standard (such as the "reasonable accommodation" standard, or the O'Brien test) which would enable courts to identify hidden instances of discrimination and insensitivity without granting

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religion any special privileges.

RLPA's core problem is that it cannot reasonably be regarded as a prophylactic measure to guard against any form of discrimination. The "compelling state interest test" is too demanding to serve that purpose; it creates special privileges, rather than enforcing equality.

If Congress were instead to design a test better suited to ferreting out unfair treatment and discrimination, RLPA's constitutional difficulties would be overcome. For example, Congress would not need to rely on the Spending Clause or the Commerce Clause--instead, Congress could rely on its power to enforce the Fourteenth Amendment, which is a much more natural foundation for a statute that aims to protect religious liberty. The Boerne Court made clear that Congress' Section Five power enabled it to accommodate religion insofar as it did so through mechanisms that were "congruent" and "proportionate" to the goal of protecting religion against discrimination, insensitivity, and hostility. As I have already explained in my answer to your thirteenth question, accommodations of this kind would also survive scrutiny under the Establishment Clause.

17. S. 2148 includes a new definition of "religious exercise" making clear that a particular action need not be "compulsory or central to" a claimant's theology to avoid having judges make theological determinations. Could each of you explain why the new definition is or is not appropriate or constitutional?

RESPONSE: As I explain in my written testimony, RLPA's new definition of "religious exercise" departs from the law of virtually every circuit court that interpreted RFRA. For reasons set forth in that testimony, I believe that this departure is unwise, and that it exacerbates RLPA's constitutional difficulties. Rather than reiterating that analysis here, let me add an example to illustrate the point. Some people believe, with great sincerity, that every action in their life and every minute of their day should be a testament to their faith in the Lord. For people who conceive of their religion in this way, their

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faith permeates every action they take and every decision they make. Under RLPA's unprecedented and expansive definition of "religious exercise," it seems at least probable, and perhaps inevitable, that every "substantial burden" imposed by law on such a person would be a "substantial burden" on that person's religious exercise. Given the extraordinary diversity of religious belief in the United States, I think it would be extremely imprudent for Congress to enact so sweeping, and unpredictable, a privilege.

18. Is there anything raised by the hearing or the legislation that you would like to further comment on or submit to supplement any of your statements or answers?

RESPONSE: No. I've already gone on at great length in some of my answers, and I do not wish to presume further upon your patience.

**Responses of PROFESSOR EISGRUBER to Questions from SENATOR THURMOND.**

1. Some have argued that the purpose of the Religious Freedom Restoration Act was to return to the strict scrutiny standard that the Supreme Court had applied to the Free Exercise Clause before Employment Division v. Smith, 494 U.S. 872 (1990). This appears to be true as a general rule.

A. However, it does not appear to be true as to prisoners, whose constitutional rights could be interfered with if the interference was "reasonably related to legitimate penological objectives," based on O'Lone v. Estate of Shabazz, 487 U.S. 355 (1987). Do you agree?

RESPONSE: I agree that the O'Lone standard, which you have accurately quoted, governed Free Exercise claims by prison inmates prior to Smith.

B. Before O'Lone and Turner v. Safley, 482 U.S. 78 (1987), did most circuit courts of appeals apply a standard for prisoners similar to the O'Lone standard?

RESPONSE: I have not reviewed the circuit court decisions on this point prior to O'Lone, and so cannot speak to your question.

C. Are you aware of other situations in the application of the Free Exercise Clause where strict scrutiny was not the standard before Smith, other than the prison context?

RESPONSE: Yes. In Goldman v. Weinberger, 475 U.S. 503, 506-07 (1986), the Court held that strict scrutiny did not apply to military policies. In Lynn v. Northwest Indian Cemetery Protective Association, 485, U.S. 439, 448-51 (1988), the Court held that strict scrutiny did not apply to the government's decisions about how to use its own property.

D. After Smith, are there still some situations where strict scrutiny is still the standard?

RESPONSE: Yes. The Smith Court said that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." Smith, 494 U.S. at 884; see also Boerne, 117 S. Ct. at 2161.

This exception to Smith's general rule is quite important. Many decisions burdening

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religion, for example, result from case-by-case decisions made by government bureaucrats, not from "neutral and generally applicable laws." Even after Smith, decisions of this kind will be subject to heightened scrutiny, and some of them will be subject to strict scrutiny.

Indeed, Professor Laycock has argued in his academic writing that "many statutes violate Smith and Lukumi. Federal, state, and local laws are full of exceptions for influential secular interests. Moreover, the details of federal, state, and local laws are frequently filled in through individualized processes that provide ample opportunity to exempt favored interests and refuse exemptions to less favored interests, often including religious practice." Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 772 (1998). Laycock concludes that Smith may provide much more protection for Free Exercise rights than Congress realized when it passed RFRA. Id. at 774.

2. The dissent in O'Lone argued that the proper standard for the analysis of prisoner claims under the Free Exercise Clause should be intermediate level scrutiny--i.e., that the restrictions should be upheld if they "are necessary to further an important governmental interest . . . and are no greater than necessary to achieve prison objectives." Do you believe that this standard would be sufficient for the courts to protect the ability of prisoners to properly exercise their religion? Do you believe it would be too burdensome on prison administrators for security and safety?

RESPONSE: I think that prisoners should be subject to the same statutory standard as everybody else. For the most part, courts are extremely deferential to the claims of prison wardens, and I expect that will be the case under any statute Congress enacts in this area.

Of course, the "compelling state interest test" might sometimes make it difficult for prison wardens to do their job effectively. That is not, however, because prisons are unique. On the contrary, it is because applying the "compelling state interest test" to claims of the sort envisioned by RLPA and RFRA would interfere with

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every kind of governance interest: the administration of prisons, the application of zoning regulations, the operation of schools, the enforcement of child care and family laws, and so on.

3. In applying the Religious Freedom Restoration Act, it appears that some courts required prisoners to show that the requests they made were based on a central tenet of the person's religion, see Bryant v. Gomez, 46 F. 3d 948 (9th Cir. 1995), while other courts only required that the requests be based on a central tenet of a prisoner's sincerely held individual beliefs, see Werner v. McCotter 49 F. 3d 1476 (10th Cir. 1995).

- A. Do you agree that courts have made this distinction?

RESPONSE: No. I believe that courts cannot discriminate among religious beliefs on the basis of whether they are widely held. A lone individual's idiosyncratic beliefs are no less entitled to respect than those of a member of a popular, organized religion. I do not think that Bryant holds to the contrary.

- B. Does the Religious Liberty Protection Act clarify this distinction, and if so, how?

RESPONSE: I do not believe the Act speaks to this distinction at all.

- C. Does the Religious Liberty Protection Act require that the tenet be central to the religion (regardless of whether the tenet is objective, i.e., based on an objectively identifiable tenet of a religion, or subjective, i.e., based on an individual's belief that a particular tenet exists) for strict scrutiny to apply?

RESPONSE: No. On the contrary, the Act explicitly provides that the tenet need not be central to the claimant's religion. Section 8(1) ("the term 'religious exercise' means an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief") (emphasis added).

As I indicate in Section I.3 of my

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written testimony, this provision departs from settled law in virtually every circuit.

- D. If the test under the Religious Liberty Protection Act is only whether the tenet is based upon a sincerely held belief of an individual, it appears that the court would almost always have to make a credibility determination of whether the claimant was sincere. Would this essentially prevent the courts from granting summary judgment in any such case?

RESPONSE: It would indeed be difficult for courts to grant summary judgment on questions about whether claimants actually held the beliefs they claimed to have. Courts might, however, sometimes be able to grant summary judgment on other issues, such as whether there was a "substantial burden" on the asserted belief.

4. How do courts define a "religion" for purposes of receiving protection under strict scrutiny? In other words, can a religion be the beliefs of one person and receive protection under the Religious Freedom Restoration Act or must it be established or exist in some objective manner beyond the claim of one individual?

RESPONSE: The Supreme Court has held fairly clearly that a religion may be defined by the sincerely held beliefs of a single person. In Frazee v. Illinois Security Dept., 489 U.S. 829 (1989), the Court dealt with an unemployment benefits claim brought by a man who contended that his personal religious beliefs prohibited him from working on Sundays. The man was not a member of any organized church, and churches with beliefs similar to his did not in fact prohibit their members from working on Sunday.

The Court held that the man's religious exercise was protected even though his beliefs were not shared by others. The Court said, "Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious faith." 489 U.S. at 834.

**Responses of PROFESSOR EISGRUBER to Questions from SENATOR GRASSLEY.**

1. Right now, it's still an open question as to whether the original Religious Freedom Restoration Act is constitutional as applied to the federal government. Do any of you have any thoughts on how the courts are likely to decide this question?

RESPONSE: I believe that the federal applications of RFRA will eventually be held unconstitutional on the ground that they violate the Establishment Clause. As Justice Stevens explained in his concurring opinion in Boerne, RFRA impermissibly privileges religion over non-religion.

2. The current proposal which Senator Hatch and Senator Kennedy have introduced prohibits the recipients of "federal financial assistance" from substantially burdening "a person's religious practice." I have a few questions about this:
- A. What does the phrase "federal financial assistance" mean? Is the phrase intended to cover indirect financial assistance where no money changes hands, but where the federal government provides favorable tax treatment? Let me give you an example. Earnings from municipal bonds are tax free under the tax code, meaning that municipal units of government get a financial benefit in the bond market that other bond-issuers do not get. Does the favorable tax status of municipal bonds constitute "federal financial assistance" within the meaning of S. 2148 such that the bond-issuers actions are subject to the restrictions listed in S. 2148?

RESPONSE: That is a very good question. In my view, the only honest answer is to say that S. 2148 is ambiguous on the point. I hope that, if Congress eventually passes the bill, it will first clarify this matter. Otherwise, I think it is anybody's guess what courts will do with it.

- B. What does the term "person" mean? Is it meant to cover corporations and other entities which are deemed persons under the law? If so, why do we want to provide religious freedoms to corporations?

RESPONSE: Churches are often incorporated under state law. For that reason, it might be difficult to exclude corporations from the ambit of the word "persons" in S. 2148 without thereby excluding churches from coverage.

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- C. S. 2148 says that recipients of federal financial assistance can't substantially burden religious practice. Can any of you give examples of non-substantial burdens on religious practice which wouldn't violate S. 2148?

RESPONSE: On this point, as on so many others, S. 2148 is highly ambiguous. There is no settled legal doctrine about what counts as a "substantial burden." RFRA includes the same language, and its history illustrates the difficulties that result. For example, several district courts were faced with cases in which churches complained about zoning ordinances which prevented them from operating soup kitchens in residential neighborhoods. Zoning authorities responded by saying that the ordinances did not impose a "substantial burden," since the churches could solve the problem by renting space in nearby, non-residential areas. The churches said that having to rent space elsewhere was a "substantial burden." Courts divided about how to decide the issue. Compare, e.g., Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (no substantial burden exists) with Western Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994) (substantial burden exists).

Some courts have suggested that there is "no substantial burden placed on an individual's free exercise of religion where a law or a policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'" Goodall v. Stafford County School Bd., 60 F. 3d 168, 171 (4th Cir. 1995). This rule has the great virtue of constraining RFRA's sweep, since a huge variety of laws (including every tax law and most zoning laws) will impose financial burdens of one kind or another. On the other hand, it is not immediately obvious that a burden is "insubstantial" merely because it is financial--on the contrary, most people would consider large financial burdens to be substantial indeed.

- D. S. 2148 says that a policy can be considered to burden religious practice even if the policy is a generally applicable policy. I have a question about policies of

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general applicability and the substantial burden test I referred to in the last question. Can there really ever be an inadvertent substantial burden on religious freedom?

RESPONSE: I think so. Consider, for example, the Oregon law at issue in Department of Employment Services v. Smith, 494 U.S. 872 (1990). The law criminalized the possession and use of peyote, a narcotic. This created a problem for practitioners of a Native American religion, which uses peyote in its ritual ceremonies. It is possible that, when the Oregon legislature enacted its controlled substances laws, it was unaware that any church used peyote in this way. Under those circumstances (and I am speaking hypothetically; I do not know whether the Oregon legislature in fact knew anything about peyote's religious significance), the resulting burden on religious exercise might be both substantial and inadvertent.

**Responses of PROFESSOR MISGRUBER to Questions from SENATOR DeWINE.**

1. In your opinion, how would the Religious Liberty Protection Act (RLPA) affect health and safety laws that conflict with religious practices or beliefs in which parents fail to seek medical treatment for their children? Even if such health and safety laws protecting children meet the "compelling interest" requirement, how could the "least restrictive means" requirement affect current laws? Please use examples to support your explanation.

RESPONSE: Two points seem clear. First, courts will almost certainly recognize the "health and safety of children" as a "compelling state interest." Second, the "least restrictive means" requirement will significantly constrain the choices available to government authorities charged with protecting child welfare. The "least restrictive means" standard demands something close to perfection from administrators and bureaucrats--and perfection is not easy for human beings to deliver in practice.

A RFRA case from Vermont illustrates these points. In Hunt v. Hunt, 162 Vt. 423, 648 A. 2d 843 (1994), a father refused to comply with a court's child-support order. He gave religious reasons for doing so: he said that he was obliged to give all of his money to his church. A trial court refused to excuse the father from his child support obligations, and issued a criminal contempt citation. On appeal, the decision was reversed in part. The appellate court agreed that the father was obliged to make the child support payments, but held that criminal contempt proceedings were not the "least restrictive means" of enforcing that obligation. Thus, because the father in Hunt was religiously motivated, he was immunized under RFRA from sanctions applicable to other "deadbeat dads."

Did the Hunt decision harm child safety? It's hard to say. The Hunt court seemed to think that child welfare authorities would be able to collect the support payments without resorting to contempt proceedings. On the other hand, we all know that child support orders can be hard to enforce. To the extent that we limit the enforcement options of courts and government agencies, we increase the likelihood that some children will be denied the money owed them.

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Consider another example. Many churches operate daycare centers. In general, daycare centers are heavily regulated. Presumably, churches will be able to obtain exemptions from some of these regulations; it is hard to believe that all of the regulations will be the "least restrictive means" to ensure that daycare centers operate safely and responsibly. Yet, exempting church-run daycare centers from ordinary regulations will create risks. Many churches will run excellent and valuable daycare operations, but courts will not be able to pick and choose among religions--and one need only think of cases like the Branch Davidians in Waco to imagine some of the unsavory situations that might result.

The bottom line is this: RLPA certainly puts child health and safety at risk to some extent, and it is impossible for any honest person to assess that risk with any certainty. We don't know what effects RLPA's "compelling state interest" test would have, because that test has never been consistently and regularly applied by courts in the area of Free Exercise exemptions.

RFRA's supporters, and now RLPA's, have belittled these concerns by suggesting that the "compelling state interest test" had a proven track-record in the federal courts before the decision in Department of Employment Services v. Smith, 494 U.S. 872 (1990). As I indicate in my written testimony, this assertion is badly misleading. Indeed, some of RLPA's supporters have admitted as much. Consider, for example, the views of Professor Thomas Berg, who supports RFRA and RLPA and who testified in support of RLPA at the June 16th hearing of the House Judiciary Committee's Subcommittee on the Constitution. According to Professor Berg, the Congress that passed RFRA "never fully faced up to the inconsistent currents in pre-Smith law." Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 Vill. L. Rev. 1, 26 & n. 119. Because of those inconsistencies, "It is not logically possible to give effect to all [pre-Smith] cases or to construe the compelling interest test '[no] more stringently

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or leniently than it [ever] was prior to Smith." Obviously, it is impossible to do more than speculate about the ultimate impact of a test which has, even in the eyes of those (like Professor Berg) who endorse it, a record of patently inconsistent and contradictory applications.

2. Do you believe that the Prison Litigation Reform Act adequately addresses the concern that frivolous cases based on "sham" religions or suspect religious practices will be filed unless prisoners are exempted from RLPA?

RESPONSE: I do not know much about the Prison Litigation Reform Act, and will leave this question to persons better qualified to address it.

3. Are there any examples of cases in which prison administrators have been able to successfully deny religious exemptions because of security or public health and safety concerns that, in your opinion, would most likely NOT be upheld using the strict scrutiny analysis?

RESPONSE: A recurring fact pattern involved prison rules that regulate hair-length and facial hair of inmates. Wardens defend such rules on the ground that they promote prison safety: in their absence, prisoners might conceal weapons in their body hair, and they might use hair styles to cement the group identity of prison gangs. Under RFRA, some courts invalidated these rules on the ground that prisons had less restrictive ways to achieve their goals. See, e.g., Lockette v. Lewis, 883 F. Supp. 471, 479-83 (D. Ariz. 1995) (court issues order granting inmate, who professed to be a member of the "Freedom Church of Revelation," permission to wear a beard, wear a specially colored hat, and eat a special diet). Other courts deferred to the judgment of the prison administrators. For discussion of the prison cases under RFRA, see Ira C. Lupu, Why the Congress Was Wrong and the Court Was Right--Reflections on City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 793, 805 & nn. 62-65 (1998).

RLPA would certainly make it harder for prison wardens to do their jobs. In that respect, however, wardens are no different from public

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school principals, zoning officials, child welfare  
authorities, and many others. RLPA interferes with  
legitimate governance interests at every turn.

**Responses of, PROFESSOR EISGRUBER to Questions from SENATOR FEINGOLD.**

- (1) Although this may be a minority opinion, I would like you to comment on whether RFRA and now RLPA may be a violation of the Establishment Clause. As noted by Justice Stevens in his concurrence in Boerne:

RFRA is a law respecting an establishment of religion that violates the First Amendment of the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

As I understand it, the Supreme Court held in Texas Monthly v. Bullock that while government cannot favor one religion over another, it may also not favor religion over non-religion. That being the case, how does Bullock reflect on the constitutionality of RFRA and RLPA?

RESPONSE: I agree with Justice Stevens that RFRA is an unconstitutional establishment of religion. I believe that Sections 2 and 3(b)(1)(A) of RLPA create comparable privileges for religion, and that RLPA therefore also amounts to an unconstitutional establishment of religion. Moreover, I believe that the Court as a whole will eventually vindicate Justice Stevens' view on this point.

Bullock is the most recent of three key precedents which underscore RFRA's, and now RLPA's, unconstitutionality under the Establishment Clause. In Bullock, the Court reviewed a Texas statute which exempted religious publications, but not other publications, from the state's sales tax. The Supreme Court held that this preference for religion was unconstitutional.

In Thornton v. Caldor, 472 U.S. 703 (1985), the Court struck down a Connecticut statute which gave all religious employees the right not to work on their Sabbath. Employees who had non-religious reasons for wishing to stay home on a

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particular day (such as, for example, because they could not secure adequate child care on that day) received no comparable exemption. Again, the Supreme Court held this preference for religion was unconstitutional.

Finally, in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970), the Supreme Court extended conscientious objector status to secular as well as religious claimants. Most of the Justices footed this conclusion on statutory grounds, rather than on constitutional ones. Yet, as Justice Harlan pointed out in his concurring opinion in Welsh, the statutory argument is rather strained. Harlan expressly rested his vote on Establishment Clause grounds, 398 U.S. at 344-67 (Harlan concurring), and it seems best to read Welsh as expressing an implicit Establishment Clause norm.

In the face of this line of cases, RLPA's proponents rely heavily on a single precedent, Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987). In Amos, the Court upheld provisions exempting churches and other religious employers from federal statutes which prohibited discrimination on the basis of religious faith.

The crucial question is why the exemption in Amos was treated differently from the exemptions in Bullock and Caldor. RLPA's defenders sometimes suggest that exemption in Amos was more defensible because it was somehow more "general" than the exemptions at issue in Bullock and Caldor. RLPA, they say, is even better than the exemption upheld in Amos, because RLPA is so general that it applies to everything. This argument, however, does not make much sense. I fail to see how the exemption in Amos was any more "general" than the ones stricken in Bullock and Caldor. In one sense, all three exemptions were "general": they were equally available to all religions, not merely to particular denominations. In another sense, all three exemptions were "targeted": each one applied to a specific practice (in Amos, to workplace discrimination; in Bullock, to the taxation of publications; and in Caldor, to employees' freedom to determine their work schedules).

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In fact, there is a much more sensible and straightforward way to explain why Amos is different from Welsh, Caldor, and Bullock. Laws that prohibit discrimination on the basis of religious faith impose unique burdens upon churches and other religious employers. It may be reasonable to ask Burger King to hire short-order chefs without regard to religious affiliation, but it is not reasonable to ask the Catholic Church to hire priests without regard to their religious faith. Thus, the exemption upheld in Amos is a sensible accommodation of religion because it responds to burdens that are unique to religious institutions. The exemptions in Thornton and Bullock, by contrast, dealt with burdens that were shared equally by everybody. All employees would like to be able to control their work schedules, all pacifists would like to avoid military conscription, and everybody would like to be exempt from taxation.

Obviously, RLPA is much more like the impermissible exemptions in Bullock and Caldor than the permissible one in Amos. RLPA applies to a huge variety of burdens that are shared equally by people without regard to whether they are religiously motivated. So, for example, RLPA would give religiously motivated parents, but not others, the right to object to public school curricular programs which they found morally objectionable; RLPA would exempt religiously motivated property-owners, but not others, from local zoning restrictions; and so on.

The bottom line is this: legislative accommodations for religious practice are permissible under the Establishment Clause only if "they are reasonable prophylactic measures to guard against otherwise unreachable instances of discrimination, hostility, or insensitivity to religious belief." Christopher L. Eisgruber and Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 S. Ct. Rev., at 133. Such "reasonable prophylactic measures" might take either of two possible forms. They might take the form of "narrow exemptions crafted to target probable

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instances of discrimination." *Id.*, at 135. Or they might take the form of a mild, across-the-board standard (such as the "reasonable accommodation" standard, or the Q'Brien test) which would enable courts to identify hidden instances of discrimination and insensitivity without granting religion any special privileges. RLPA and RFRA are too sweeping and too extreme to fit either category. As a result, they are both unconstitutional under the Establishment Clause.

- (2) Please allow me to ask another question that addresses the Establishment Clause issue. What if conscription was reestablished, and a man objected due to religious reasons-- he would at least have a claim under RLPA or RFRA would he not? But if a man objected to conscription for some deeply held and sincere secular beliefs, he would not have such a claim.

Is providing such a claim for religious beliefs and not for other deeply held secular beliefs a violation of the Establishment Clause?

RESPONSE: Yes, it is. Technically speaking, the Supreme Court avoided reaching that question when it decided United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). In those cases, the Supreme Court dealt with a statute that offered conscientious exemption status only to those persons who "by reason of their religious training and belief are conscientiously opposed to participation in war in any form;" the statute defined "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." 380 U.S. at 165. Despite this apparently clear statutory language, and even clearer legislative history, the Court held, as a matter of statutory construction, that conscientious objector status was available to secular objectors as well as religious ones. (My co-author and I have discussed the statutory issues in Christopher L. Eisgruber and Lawrence G. Sager,

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The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1294-95 & n. 95 (1994). Justice Harlan, who concurred separately in Welsh, said that the case was indefensible if viewed as an exercise in statutory interpretation. 398 U.S. at 344-67 (Harlan concurring)). Harlan said that the only sensible way to view Welsh was as an Establishment Clause decision, and he cast his vote on those grounds. I agree with Justice Harlan, and I believe that the current Court would clearly do so as well.

What if the conscientious objector in my hypothetical claimed that his deeply held beliefs were secular in nature, but nonetheless constituted a "religion" for him--would he then have a claim under RFRA or RLPA?

RESPONSE: To be honest, I don't know; it's an excellent question. As I indicated above, an argument of this kind prevailed in Seeger and Welsh, where the statutory language was far more explicit than RLPA about what counts as "religion." If your hypothetical objector hired me as his lawyer, I would certainly make the argument you propose. On the other hand, if courts were to accept this argument, the effects would be dramatic. RLPA obviously sweeps much more broadly than the statute at issue in Seeger and Welsh; indeed it applies to virtually every area of law. If conscientious, secular objections trigger RLPA's provisions in the context of conscription, then presumably they must also do so in the context of, for example, zoning disputes. That interpretation of RLPA would cure its Establishment Clause defects. But I am not sure that this is what its proponents have in mind.

For the purposes of RLPA, what do you see as the definition of a "religious" belief or exercise? That is, what distinguishes a religious belief from a secular belief?

RESPONSE: Again, this question is excellent and difficult, and I doubt I can give a fully satisfactory answer. It is notoriously hard (perhaps impossible) to define "religion." It is perhaps even harder to come up with a definition that courts can apply reliably and consistently in

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practice. See, e.g., Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978). One problem with RLPA and RFRA is that they compel courts to pursue this intractable difficulty in a wide variety of circumstances.

Indeed, the difficulty runs even deeper than that, for courts must contend not only with the distinction between secular and religious reasons, but also with the wide variety of different religious reasons that might come into play. For example, suppose that a woman living in a residential neighborhood wishes to operate a soup kitchen from her garage, and asserts that she has religious reasons for doing so. She therefore seeks an exemption from local zoning laws. If she is a regular church-goer, and if her religion demands that she feed the poor from her home, then she obviously has a claim (whether or not she prevails) under RLPA. Suppose, though, that she has not been to church in several years. Does that matter to her claim? Or suppose that her religion requires her to "care for the needy," but not necessarily to "feed the hungry,"--much less to do so from her own home? Does that matter? Under RLPA, courts would find themselves involved in all of these questions.

I have not yet answered your question, of course. I do not wish to be evasive. If I were a judge, and if I were prohibited (by a higher court's decision, for example) from holding RLPA unconstitutional, I suppose that I would be most concerned to avoid the unfairness that would result if religious convictions were treated more favorably than equally serious secular convictions. I would therefore follow the path of the Seeger and Welsh courts, and interpret "religion" very broadly, so that it encompassed even secular convictions--such as the conviction shared (I hope) by all parents, secular and religious, that they should do whatever they can to care for their children. As I said in my answer to the last question, though, this strategy would make RLPA's breadth even greater than it first appears. But I see no way out of that difficulty.

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- (3) Some commentators have suggested that RFRA and now RLPA may have some Free Speech problems. For example, take the case of a claim for exemption from solicitation and literature distribution regulations. In such a case, it seems to me that the granting of an exemption for only religious adherents would violate the First Amendment principle that there is an equality in the realm of ideas.

If RLPA were interpreted to allow the religious speaker the right to solicit funds and distribute literature in circumstances where the non-religious speaker would be denied the right, should not the statute be struck down under the Freedom of Speech clause?

RESPONSE: Yes. In my view that conclusion follows ineluctably from Bullock. Government cannot prefer religious speech at the expense of non-religious speech (nor, conversely, may government prefer non-religious speech at the expense of religious speech. See, e.g., Rosenberger v. Rector, University of Virginia, 515 U.S. 819 (1995)).

- (4) RLPA obviously works under the assumption that laws of general applicability which detrimentally affect a person's Free Exercise rights are an evil that we must protect against. I agree. In furtherance of this objective the bill would provide that a RLPA plaintiff will not need to demonstrate that the government intended to discriminate against them. Yet, the Supreme Court held in Village of Arlington Heights v. Metropolitan Housing Development Corporation--a land use/zoning case--that for racial discrimination disparate impact is insufficient. Indeed a plaintiff claiming racial discrimination must demonstrate an intent on the part of the government to do so.

Why should a plaintiff claiming religious discrimination have a much lower threshold than a plaintiff claiming racial discrimination?

RESPONSE: I agree with your characterization of the law, and I can think of no good reason for this disparity in legal standards.

Indeed, the contrast between RLPA and Arlington Heights is even more dramatic than your question suggests. If RLPA applied only to cases of disparate impact discrimination, it would

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already treat religious discrimination with greater solicitude than racial discrimination--since, as you point out, Arlington Heights requires victims of racial discrimination to show discriminatory intent. But RLPA does not require even a showing of disparate impact. It applies the "compelling state interest test" to every substantial burden on religious exercise, even when the burden in question is shared equally by all persons, whether or not they are religiously motivated (as will often be the case with, for example, zoning regulations and taxes).



RESPONSES OF MICHAEL W. MCCONNELL TO QUESTIONS FROM  
SENATOR DEWINE

July 10, 1998

Senator Michael Dewine  
Committee on the Judiciary  
224 Dirksen Senate Office Bldg.  
Washington, D.C. 20510-6275

Dear Senator Dewine:

During the Committee's June 23 hearing on the proposed Religious Liberty Protection Act (RLPA), you asked how, in my opinion, the proposed Act would affect health and safety laws that conflict with religious practices or beliefs in which parents fail to seek medical treatment for their children.

Of course, the answer to any question about specific applications of RLPA is unavoidably speculative, but in this case the answer is almost certainly that there would be no negative effect. The health and safety of children are surely among the most uncontroversial examples of a "compelling governmental interest." I am aware of no cases in which the compelling interest-least restrictive alternative standard has interfered with child protection. That includes the years in which the *Sherbert-Yoder* test was enforced as a matter of federal constitutional law, the half dozen states that have adopted that test as a matter of state constitutional law, and the years in which the Religious Freedom Restoration Act was enforced. The concern that RLPA would hobble vital child protective efforts lacks any basis in actual experience.

Most controversies over child protection measures already involve highly individuated determinations, as opposed to the rote application of neutral and generally applicable laws. Many other such cases fall within the "hybrid" category of free exercise combined with parental control. Thus, it is likely that most such cases already would be governed by the compelling interest, least restrictive means tests even under *Smith*. RLPA would therefore make little practical difference for this class of cases. In any event, because protection of children is such an important interest, RLPA would likely have little effect on outcomes, except in the most unusual situations.

You inquire specifically about the effect of the "least restrictive alternative" part of RLPA. This part of the compelling interest test applies only where the alternative would be no

less effective in meeting the governmental objective, namely the protection of children. Under this standard, religious claimants would only be able to challenge government action that *unnecessarily* interferes with religious freedom. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980); *First National Bank of Boston v. Belotti*, 435 U.S. 765, 786 (1978) (defining the "least restrictive means" test). There is no reason to think that judges, who regularly make determinations about the interests of children under discretionary standards, would be likely to exercise their discretion to make harmful decisions under this statutory scheme. Indeed, in some cases, the "least restrictive alternative" standard of RLPA could result in better solutions to the often wrenching questions raised in the child protection area. By helping to uncover a means that accomplishes that the governmental objectives equally well, but at less cost to the religious freedom of others, the likely result is a win-win situation in which cooperation replaces confrontation.

A good illustration of this "least restrictive alternative" approach involves the treatment of Jehovah's Witness children whose doctors conclude that they require blood transfusions. One possible means of achieving this objective is to require parents to consent to the blood transfusion, and to impose criminal or civil punishment if they fail to do so. The likely result is that the parents will seek to evade the requirement, which would be a grave violation of their religious tenets, and to induce them to avoid contact with doctors and hospitals. Accordingly, most states have adopted a less restrictive alternative: for health care officials to obtain court orders authorizing the necessary blood transfusions without parental consent. See, e.g., *Jehovah's Witnesses in State of Washington v. King County Hospital*, 390 U.S. 598 (1968), *summ. aff'g* 278 F. Supp. 488 (W.D. Wash. 1967); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, *cert. denied*, 344 U.S. 824 (1952); *State v. Perricone*, 37 N.J. 463 (1962). This fully protects the children, represents a far less serious abridgement of the religious freedom of the parents, and makes cooperation between parents and medical authorities more likely.

It is possible that, in other contexts involving health care decisions, the existence of a law like RLPA might facilitate the discovery of similar "less restrictive alternatives" that would in fact be superior to punitive and confrontational approaches. It is important to remember that many of these situations involve loving parents who are deeply concerned about the welfare of their children, albeit with a different understanding about how to attain that welfare. In such cases, it is not unlikely that accommodation will work better than confrontation.

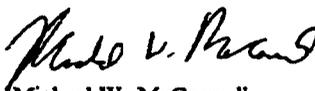
I was involved in a case several years ago in which loving Christian Science parents, who acted in compliance with the state law as they knew it, were assessed \$1.5 million in civil damages, after the fact, when their child died under Christian Science care. In a legal position I helped to draft, the parents suggested that a less restrictive, but more effective, alternative to after-the-fact punishment (amounting in their case to bankruptcy) was to require parents relying on spiritual treatment in cases of serious danger to their child's health to notify state child health authorities, which would enable them to intervene with medical care in appropriate cases. Although certiorari was denied in that case, the Minnesota legislature has enacted

legislation along those lines. See Minn. Stat. § 626.556. A copy of this certiorari petition is attached to this letter.

In short, while the "least restrictive alternative" requirement of RLPA could not, by its terms, require the state to adopt less effective measures, it does hold out the possibility of bringing about mutually satisfactory accommodations. The general philosophy of RLPA is not to give one side or the other in these controversies an absolute "trump," but to provide a mechanism by which both sides have the incentive and legal leverage to work toward reasonable accommodation.

Although I have represented Christian Scientists, Jehovah's Witnesses, and other religious parties in litigation in the past, I write this letter entirely in my personal and academic capacity.

Very truly yours,



Michael W. McConnell  
Presidential Professor  
College of Law

cc: Chairman Hatch  
attachments to be sent by Federal Express

No. 95-355

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**In the  
Supreme Court of the United States**  
**October Term, 1995**

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**Kathleen McKown, William McKown,  
Mario Tosto, and Quinna Lamb,**

*Petitioners,*

vs.

**Douglass G. Lundman, as trustee  
for the next of kin of Ian  
Douglass Lundman, deceased,**

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE MINNESOTA COURT OF APPEALS**

---

**PETITION FOR A WRIT OF CERTIORARI**

---

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QUESTIONS PRESENTED

1. Whether the First Amendment permits state courts to create a new tort law duty that effectively prohibits the practice of a religion, in the face of a substantially less restrictive alternative, enacted by the legislature, which adequately protects the state's interests.
2. Whether liability may be imposed on a clergyman for allegedly negligent or unreasonable performance of his religious function.
3. Whether due process principles of fair notice permit state courts to impose damages on individual believers for religiously motivated conduct that was reasonably interpreted as falling within the scope of statutes passed for the specific purpose of protecting and accommodating that conduct.

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**PARTIES TO THE PROCEEDING**

In addition to the petitioners, the following parties were defendants in the district court and appellants in the Minnesota Court of Appeals: Clifton House, Inc.; The First Church of Christ, Scientist; and James Van Horn. Because the judgments against these parties were reversed by the Court of Appeals in their entirety, they have no legal interest in this Petition.

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**In the  
Supreme Court of the United States  
October Term, 1995**

Kathleen McKown, William McKown,  
Mario Tosto, and Quinna Lamb,  
*Petitioners,*

vs.

Douglas G. Lundman, as trustee  
for the next of kin of Ian  
Douglas Lundman, deceased,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE MINNESOTA COURT OF APPEALS**

**PETITION FOR A WRIT OF CERTIORARI**

*Petitioners Kathleen McKown, William McKown, Mario Tosto, and Quinna Lamb respectfully petition for a writ of certiorari to review the decision of the Minnesota Court of Appeals in this case.*

**OPINIONS BELOW**

The opinion of the Court of Appeals of Minnesota (Pet. App. 1a-64a) is reported at 530 N.W.2d 807. The opinion of the district court (Pet. App. 65a-125a) is not reported.

## JURISDICTION

The decision of the Court of Appeals was filed on April 4, 1995. Timely Petitions for Review to the Supreme Court of Minnesota were denied on May 31, 1995. Pet. App. 126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

This case involves the imposition of \$1.5 million in damages against four individuals of modest means for their reliance on spiritual treatment in the care of Ian Lundman, the 11-year-old son of petitioner Kathleen McKown and her ex-husband, respondent Douglass Lundman.

### I. Facts

The four petitioners are Ian Lundman's mother Kathleen McKown, a lifelong Christian Scientist who made all of her son's health care decisions; Ian's stepfather William McKown who made none of them; the Christian Science practitioner, Mario Tosto, engaged by Kathy solely to provide Ian with spiritual treatment through prayer,<sup>1</sup> and the Christian Science nurse, Quinna Lamb (now Giebelhaus), who was hired to look after Ian's physical comfort. After Ian's death, they were sued by respondent Douglass Lundman, Ian's birth father who had left both Christian Science and Ian's mother during the 1980s. Although respondent, upon divorce, ceded full custody of their two children to Kathy, sought no agreement about

<sup>1</sup> A Christian Science practitioner is a specially experienced person who through consecration, study under an authorized teacher, and satisfactory evidence of successful healing, is available to provide spiritual treatment through prayer, usually for a nominal fee. Practitioners have no medical training, and engage in neither the diagnosis nor the physical treatment of disease.

medical treatment from her, deferred to Kathy's decision to rely on spiritual treatment even when the children were in his care, and never requested that she resort to conventional medicine for either child, the jury awarded him over \$14 million in damages when Ian died under Christian Science care.

In May 1989, Ian Lundman, 11 years old, contracted juvenile onset diabetes. There was no history of diabetes in the family and it was not until postmortem examination that the diagnosis was made. 7/29 T. 26. On May 6, 1989, he complained to his mother that his stomach hurt. 7/26 T.82. Consistent with her religious beliefs, Pet. App. 18a, Kathy immediately began to pray for her son. She had lifelong experience with spiritual healing and had found it successful for her children in both serious and ordinary cases. 7/26 T. 80-81; 7/27 T. 47-57, 72-73, 81-82, 112-17; 7/28 T. 80; 8/5 T. 128. Consequently, she was confident that, in relying upon spiritual treatment, she was not only following her faith, but choosing what she believed to be the best treatment available for her son. 7/27 T.16, 131; 7/28 T.27; 8/10 T.224-226. It is undisputed that Kathy, and the other petitioners, were entirely sincere in their belief in the efficacy of spiritual treatment. Pet. App. 27a.

The next day, when Ian's condition had not improved, Kathy retained petitioner Mario Tosto, a Christian Science practitioner, to pray for Ian, 7/26 T.84-85; 8/4 T.70-75, and later obtained the services of petitioner Quinna Lamb, a Christian Science nurse, to attend to Ian's physical comfort. 7/22 T.93; 7/26 T.124. Despite their efforts, less than three days after his initial complaint, Ian died at home. 7/22 T.93, 95, 98-99, 101-105, 112, 116, 119-120, 122.

## II. Statutory Protection for Spiritual Treatment

Minnesota, in common with more than 40 other states, has enacted legislation that appears to permit parents to rely exclusively upon "spiritual treatment" in lieu of medical care when their children are sick. In Minnesota, as elsewhere, the protective provision is found in a "child neglect" statute in the form of a spiritual treatment exception to the health care requirement:

If a parent \* \* \* responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment \* \* \* of the child, this treatment or care is "health care," for purposes of this clause.

Minn. Stat. § 609.378, subd. 1(a)(1). It is undisputed that, in entrusting Ian's healing to Christian Science, Kathy McKown believed that she was acting in accordance with this law.

Since Ian's death, the Minnesota Legislature has enacted legislation that requires the parent to report to proper authorities when a child faces serious danger to his health. Minn. Stat. § 626.556. This enables the State to exercise its authority in appropriate cases, pursuant to Minn. Stat. § 626.556, subd. 10e(c), to provide medical treatment for the child over the parent's objections, but places no obligations on parents who are relying on spiritual treatment to summon a physician.

## III. The Earlier Criminal Prosecution

On October 10, 1989, a grand jury returned second-degree manslaughter indictments against Kathy and Bill McKown and Mario Tosto. The Hennepin County District Court dismissed the indictments on the basis of the Minnesota spiritual care provision and fair notice principles of due

process. The Minnesota Court of Appeals and the Minnesota Supreme Court overturned the district court's statutory construction, but affirmed the dismissal of the indictment on due process notice grounds. *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992). As the Minnesota Supreme Court held, "where the state has clearly expressed its intention to permit good faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process." 475 N.W.2d at 68-69.

## IV. Lower Court Proceedings In This Case

On April 30, 1991, respondent Lundman, as trustee of Ian's estate, brought this action for wrongful death against petitioners, as well as The First Church of Christ, Scientist, and other parties that are not before this Court. Following a seven-week trial in July and August 1993, the jury found all of the defendants negligent, and apportioned among them compensatory damages of \$5.2 million. In a separate proceeding, the same jury awarded \$9 million in punitive damages against the Church alone. The court denied all post-trial motions but remitted the compensatory damages to \$1.5 million.

On appeal, the defendants argued that imposition of tort liability in the face of the Minnesota statute permitting good faith reliance on spiritual treatment is no more constitutionally permissible than is criminal prosecution for the same conduct. The Minnesota Court of Appeals rejected that argument, solely on the ground that "confusion on \* \* \* civil liability is of much less force than uncertainty as to \* \* \* criminal prosecution." Pet. App. 30a (emphasis in original). The Court of Appeals also rejected without analysis the defendants' argument that a rule requiring Christian Scientist parents to

rely on medical care for their children -- in direct contravention of their religious beliefs -- is not the least restrictive means by which the state can further its interest in protecting children's health. The Court held that the reporting requirement subsequently enacted by the Minnesota legislature was not a less restrictive alternative under the First Amendment because it would "not always work." Pet. App. 28a. Finally, the court did not even address petitioner Tosto's argument that the "clergy malpractice" claim against him violated the First Amendment. See Tosto App. Br. 39-42; Tosto JNOV Mem. 2-12.

The Court of Appeals reversed the compensatory damage award as to three defendants who owed no duty of care to the decedent, Pet. App. 38a-45a, and the punitive damages award against the Church on constitutional and independent state law grounds. *Id.* at 22a-25a. It affirmed the compensatory damage award against petitioners. The Minnesota Supreme Court denied further review. Pet. App. 126a.

#### REASONS FOR GRANTING THE WRIT

The practice of Christian Science gives rise to recurring and difficult questions under the Religion Clauses of the First Amendment. Based on the teachings of Mary Baker Eddy, on the reports of thousands of Christian Scientists who have experienced healing without medical intervention,<sup>3</sup> and on

<sup>3</sup> There have been more than 50,000 published reports of successful Christian Science healings, a substantial number of which involved healing of conditions medically diagnosed as congenital, degenerative, or terminal. "Christian Science," *Encyclopedia Britannica* 562, 564 (15th ed. 1984). Analyses of these reports can be found in Robert Peel, *Spiritual Healing in a Scientific Age* (1987), and the Appendix: "An Empirical Analysis of Medical Evidence in Christian Science Testimonies of Healing, 1969-1988," to *Freedom and Responsibility: Christian Science Healing for Children* 109 (1989).

their own personal experiences of spiritual healing, Christian Scientists firmly believe that the most efficacious form of treatment involves a regimen of prayer, and that reliance on conventional medicine only interferes with the effort to heal through spiritual means. This does not mean that Christian Scientists sacrifice health to religion, and certainly not that they "martyr" themselves or their children. Since they regard spiritual treatment as the most effective way to restore health, Christian Scientists, such as petitioner Kathy McKown, provide it for their children just as they do for themselves.<sup>3</sup>

Even in the secular world, Christian Science treatment has won a considerable measure of respect. Deaths of children in Christian Science care have been extremely rare, and there is no evidence that Christian Science children, as a group, are any less healthy, or that fewer of them survive to adulthood, than children treated by conventional medicine. The modest costs involved in Christian Science treatment are generally eligible for health insurance coverage, and the Internal Revenue Service treats uninsured payments to Christian Science practitioners as deductible medical expenses. See IRS Publication 17 (Rev. Nov. 1985). And more than 40 states have enacted statutes specifically recognizing spiritual treatment, such as Christian Science, as an acceptable form of health care for children. See Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes*,

<sup>3</sup> In this case, for example, Kathy McKown testified to healing the child experienced as a child through Christian Science, as well as healing that her children, including Ian, had experienced on many earlier occasions. 7/27 T. 47-48 (healing of earaches and deafness); 7/27 T. 49-57 (healing of various conditions as an adult); 7/27 T. 72-73, 81-82 (healing of Ian's sister Whitney); 7/26 T. 80-81, 7/27 T. 112-117, 7/28 T. 80, 8/5 T. 128 (earlier healings of Ian of impetigo, warts, stomach illness, laceration of the thumb, and red spots). The record establishes that Kathy has never resorted to medical treatment for her personal health needs. 7/26 T. 46-47, 7/27 T. 39-57, 70-79.

*Manlaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135, 142-43 nn.41-45 (1993) (collecting statutes).

Minnesota has a typical statutory structure. A parent who neglects a child of "health care" is criminally liable for child neglect. Minn. Stat. § 609.378. But if a parent or other caregiver in good faith selects and "depends upon" spiritual treatment as remedial care for a child, that is "health care," for purposes of this clause." *Id.*

In the past decade, however, courts in a number of states, now joined by Minnesota, have effectively abrogated the protections of these spiritual treatment provisions. The decision below is characteristic.<sup>4</sup> If a child dies, the courts have held, the spiritual treatment provision affords no protection either against criminal manslaughter liability, *State v. McCown*, 475 N.W.2d 63 (Minn. 1991), or now, against civil tort liability. Pet. App. 458-47a. Accordingly, for the first time, Christian Science parents are threatened with criminal and civil sanctions for the practice of their religion and for providing to their children what they consider the best form of health care.

The importance of this case can scarcely be overstated.<sup>5</sup> It has direct and immediate impact on the way in which

<sup>4</sup> For similar decisions in other states, see *Walker v. Superior Court*, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 832 (1988), cert. denied, 491 U.S. 905 (1989); *Hermanson v. Florida*, 570 So.2d 322 (Fla. Ct. App. 1990); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986); *Commonwealth v. Twitchell*, 416 Mass. 114, 617 N.E.2d 609 (1993).

<sup>5</sup> This case has been widely recognized as the leading case on these issues, and of national importance. In earlier filings, respondent described the case as one of "exceptional importance." Petition of Douglas Lundman for Review in the Minn. Sup. Ct., at 1.

Amicus briefs were filed in the court below by the American Academy of Pediatrics, the American Medical Association, the Minnesota Chapter of the American Academy of Pediatrics, the Minnesota Medical Ass'n, The Archdiocese of St. Paul and Minneapolis,

Christian Science parents can practice their religion, as well as on members of other faiths who rely on spiritual treatment for disease. Moreover, it provides this Court an opportunity to clarify an aspect of First Amendment law that is a source of great confusion and inconsistency among the state and lower federal courts: the principle that the state may not impose destructive penalties on the exercise of religion where more narrowly tailored, less restrictive alternatives are available that would achieve the government's purpose. This is an issue of importance not just to these petitioners, or even to free exercise claimants generally, but to claimants of constitutional rights in any context where less restrictive alternative analysis applies. The case also provides an opportunity to resolve a conflict among the lower courts regarding the imposition of civil liability for clergy malpractice, and to correct a conflict between the decision below and this Court's cases regarding due process principles of notice as they apply to First Amendment-protected conduct.

the Christian Church (Disciples of Christ), the Church of Jesus Christ of Latter-Day Saints, the Church of the Nazarenes, the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, the National Association of Evangelicals, the National Council of the Churches of Christ in the USA, the Orthodox Church in America, the United House of Prayer for all People of the Church on the Rock of the Apostolic Faith, the Minnesota Trial Lawyers Ass'n, Americans United for Separation of Church and State, and the Minnesota Civil Liberties Union. Needless to say, this is unusual for a case in an intermediate state appellate court.

**I. THE FIRST AMENDMENT PROHIBITS THE STATE FROM IMPOSING COMMON LAW OBLIGATIONS DESTRUCTIVE OF A RELIGION WHERE THE LEGISLATURE HAS ENACTED A LESS RESTRICTIVE ALTERNATIVE THAT ACHIEVES THE STATE'S COMPELLING PURPOSE**

It is well established that the state may not make or enforce a law that substantially impedes the free exercise of religion unless it can demonstrate that it is "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). "[A] law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2232 (1993) (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (emphasis added)). If the state's purposes can be served by a means that is less restrictive of religious freedom, the state is not free to adopt the more severe restriction.<sup>4</sup>

<sup>4</sup> At no point in this litigation has respondent or any lower court argued that the lesser standard of protection for neutral laws of general applicability, enunciated in *Employment Division v. Smith*, 494 U.S. 872 (1990), applies to this case. Nor could they. Both the statutory and the common law rules involved in this case are specifically directed to religion. *Mina*, Stat. §§ 609.378 and 626.556 both contain special provisions for cases in which the child's parent relies in good faith on "spiritual means or prayer for treatment or care of disease." The decision below, similarly, imposed "a standard of care taking account of 'good-faith Christian Scientist' beliefs," rejecting the argument that it should apply a generally applicable "reasonable person standard." *Per. App.*, 49a. Accordingly, since the legal rules at issue are not generally applicable, but are "specifically directed at religion," *Smith* does not apply. *Cf. Lukumi*, 113 S. Ct. at 2231-33.

The essential vice of the common law rule adopted below is that it curtails the practice of religion in the face of a less restrictive means for bringing about medical intervention that has won the confidence of the legislature.<sup>7</sup>

**A. The Common Law Of Minnesota, As Interpreted By The Decision Below, Regulates Belief And Speech, As Well As Conduct, And Effectively Prohibits The Exercise Of The Religion Of Christian Science**

Among the fundamentals of the Christian Science faith, founded by Mary Baker Eddy in the late 19th century, is the teaching that illness is not a reality in God's creation. Accordingly, the treatment of disease in Christian Science is accomplished not through physical means, but through prayer. In Christian Science practice, prayer does not consist of asking God for relief from illness or suffering, but of striving for a better perception of the underlying spiritual law that nullifies illness. It is antithetical to this approach, which requires a wholehearted and undivided mental and spiritual commitment, for the Christian Scientist to adopt belief in the reality of the physical condition, or to summon a physician to "treat" it. 8/11 T.469-470.<sup>8</sup>

<sup>7</sup> Petitioners are authorized by The First Church of Christ, Scientist, to represent to the Court that it supports the petitioners' position regarding this less restrictive alternative.

<sup>8</sup> Contrary to popular misperception, Christian Science does not teach that summoning medical care is sinful, nor that the use of medicine is punished in this world or the next. Individual Christian Scientists are entirely free to decide for themselves what form of treatment to use. Christian Science practitioners scrupulously refrain even from advising patients about this decision; they are available to help those who determine to rely on Christian Science healing rather than to persuade or

The law of Minnesota, as interpreted by the decision below, imposes severe burdens on the practice of Christian Science in four distinct ways: all of which are unnecessary because the state can accomplish its purposes without imposing any of them. See section B, *infra*.

First, the court has placed the obligation to summon a medical doctor directly on the parents or, failing that, on the Christian Science caregiver. This renders further practice of Christian Science healing in the case impossible, because the act of summoning the physician (especially as part of a process that, as a practical matter, involves attending and assisting in the medical treatment, consulting with the doctor, and making subsidiary medical decisions) is inconsistent with the mental commitment to spiritual reality that Christian Science healing demands. If there is to be medical intervention, it is essential that the decision be made and carried out by outside authorities, with as little involvement by the parents as possible, so that their religious method of healing can continue.

Second, the legal obligation imposed by the court below is a regulation not just of conduct, but of *belief*. According to the court, the Christian Science practitioner "had a responsibility on these facts to acknowledge that Christian Science care was not succeeding and to persuade mother to call in providers of conventional medicine or, persuasion failing, to override her." Pet. App. 38a. To coerce a practitioner or parent to "acknowledge" that Christian Science treatment is ineffective and that a medical doctor is needed is the equivalent of forcing a theist to "acknowledge" that there is no God.<sup>9</sup> The government may have the power to compel a

coerce the unwilling. Nonetheless, Christian Scientists believe that turning to medicine, which reflects a belief at odds with spiritual reality, will frustrate the progress of spiritual healing.

<sup>9</sup> If a patient under Christian Science care is not responding to treatment, the answer (according to Christian Science practice) is not to

religious adherent to perform certain acts, but it has no authority to tell him what he should believe. The right to believe, this Court has repeatedly said, is "absolute." *McDaniel v. Paty*, 435 U.S. 618, 627 (1978); *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961); *United States v. Ballard*, 322 U.S. 78, 88 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

Third, in violation of fundamental principles of freedom of speech, the decision below coerces Christian Science caregivers to use their powers of persuasion to convince parents of the falsity of the religion. Not only must they "acknowledge" the failure of Christian Science themselves, but they must "persuade mother to call in providers of conventional medicine." Pet. App. 38a. But as this Court recently and unanimously held, the government "may not compel affirmation of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 115 S. Ct. 2338, 2347 (1995).<sup>10</sup> Surely the right of religious believers not to be compelled to persuade others to abandon their common faith is as strongly protected as the right of a veterans' group to exclude gay rights marchers from a St. Patrick's Day parade.

Fourth, in a case involving religiously motivated tort defendants, the generalized "reasonableness" standard places courts and parties in an untenable position. On the one hand, if the defendants are not permitted to explain the religious reasons for their actions and their bases for believing in them

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abandon the treatment, any more than medical doctors abandon medicine when therapy is not producing the desired result. Instead, the practitioner will modify and perhaps intensify the spiritual approach.

<sup>10</sup> Accord, *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 11 (1986); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

(including, in a case of this sort, evidence regarding the efficacy of Christian Science treatment), the jury cannot possibly assess the reasonableness of their conduct. On the other hand, if those religious reasons are placed before the jury, the jury will be permitted to decide what religious beliefs are reasonable and what are not -- a patently unconstitutional judgment for a civil court to make. *Ballard*, 322 U.S. 78 at 86-87; see *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991). As the Fifth Circuit noted in a similar context:

If the jury finds the religion plausible, it will more likely deem the conduct reasonable; on the other hand, if the particular faith strikes the jury as strange or bizarre, the jury will probably conclude that the [conduct] was unreasonable. \* \* \* [T]he jury undoubtedly assesses the plaintiff's religion in reaching its conclusion. A strong case can be made that the first amendment forbids such an assessment.

*Murn v. Algee*, 924 F.2d 568, 575 (5th Cir.), cert. denied, 502 U.S. 900 (1991).<sup>11</sup>

<sup>11</sup> Such a proceeding is an invitation to expressions of religious bigotry, as lawyers for the other side attempt to prove that the religion is unreasonable. For example, in the trial in this case, plaintiff's counsel described Christian Science concepts as Orwellian "boon-speak" and suggested that the Church established a dangerous set of religious teachings just to insure the livelihood of Christian Science practitioners. 8/17 T. 117-18, 134, 169. Counsel asked petitioner Tosto if he told Ian medical care even if it means you die." 8/4 T. 98. These are just a few of the examples of deliberate attempts to distort and ridicule the petitioner's religion. Unfortunately, this unseemly mode of advocacy is largely immune to effective appellate review. See Pet. App. 57a (holding that the prejudicial remarks of plaintiff's counsel before the jury were "not so egregious as to require a new trial") (emphasis added).

Alternatively, the court could evaluate the conduct on the basis of the defendant's perspective: the "reasonable Christian Scientist" standard. This is apparently the approach taken by the Court of Appeals. See Pet. App. 49a. But this standard requires the jury to determine what the defendant's religion demands under the circumstances. This course, too, violates the First Amendment. See *United States v. Lee*, 455 U.S. 252, 257 (1981) (civil courts may not determine "whether [a believer] or the Government has the proper interpretation of [a religious] faith"); accord, *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). Here, the Court of Appeals took upon itself the task of interpreting Christian Science religious texts for itself and concluded -- contrary to beliefs of the petitioners and their Church -- that Christian Science doctrine requires them to turn to medical treatment in some cases. Pet. App. 36a. In effect, the court told these petitioners that they had misinterpreted the teachings of their own religion. It is hard to imagine a more inappropriate role for a civil court.

Seeking to avoid these intractable problems, the Minnesota legislature instituted an objective reporting requirement and thus eliminated any need for a jury to assess the "reasonableness" of religious conduct. Unfortunately, that legislative approach was ignored by the court below.

In short, the Court of Appeals crafted a new common law remedy that, if not reviewed and reversed, will have a profoundly destructive effect on the practice of the religion of Christian Science. It effectively makes continued practice of the religion by parents when their children face life-threatening diseases impossible, violates basic constitutional principles against compelled speech and regulation of belief, and empowers juries to assess the reasonableness of religious beliefs. If these consequences were necessary to protect the lives of children, a secular court, which does not share the assumptions of Christian Science, might conceivably draw the balance as the Minnesota courts have drawn it. But for th

reasons that follow, these consequences are wholly unnecessary.

**B. The Minnesota Legislature Has Already Enacted In Its Reporting Statute A Less Restrictive Alternative**

After Ian Lundman's death, the Minnesota legislature examined the parental right it had created to rely on spiritual treatment in caring for children and voted to retain it, but added a requirement that parents and other caregivers who rely on it must report to child welfare authorities in cases involving "imminent and serious danger"—later amended to read "serious danger."<sup>12</sup> --to the child's health. Minn. Laws 1989, c. 282, art. 2, § 200, codified at Minn. Stat. § 626.556 (c). This reporting requirement is coupled with another section of the child neglect statute, Minn. Stat. § 626.556, subd. 10(c), which authorizes a child welfare agency to cause medical treatment to be provided, in appropriate cases, even over the objections of the parents. The legislative history makes clear that this system of notice and state intervention was adopted expressly for the purpose of protecting children without undue interference with religious exercise.<sup>13</sup>

The development of these statutes reflects a careful policy choice that parents, who must make health care decisions for children, be assured the right to "select" and "depend upon" spiritual treatment provided that, in serious cases, they report reliance upon that form of treatment to child welfare authorities. This careful legislative accommodation stops

<sup>12</sup> This amendment was made in 1994. Minn. Laws 1989, c. 209, art. 2 § 200.

<sup>13</sup> Legislative history in Minnesota is recorded on audio tape, from which transcriptions are made. If certiorari is granted, petitioners will provide transcripts of all relevant legislative history of these provisions.

short of requiring parents to summon medical assistance contrary to their religious convictions, while enabling the provision of medical care, when deemed necessary, in a way that intrudes less upon religious freedom.<sup>14</sup> By using an objective reporting requirement, coupled with authority to order medical treatment, the statute avoids the First Amendment pitfalls of compelling belief inconsistent with religion or requiring involuntary speech. And, unlike the tort remedy created by the Court of Appeals, the reporting statute reduces the potential for prejudice and entanglement by eliminating individual jury determinations of what a "reasonable Christian Scientist" would do.

Under this Court's precedents, a less restrictive alternative of this sort must be accepted unless it can be demonstrated that the more narrowly tailored alternative is inadequate so that more repressive means are necessary. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2234. See also *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994) (even under intermediate scrutiny, the government bears the burden of demonstrating that a law restricting First Amendment freedoms "does not burden substantially more speech than is necessary to further the government's legitimate interests") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

<sup>14</sup> This accommodation is similar to that provided to parents of the Jehovah's Witness faith, who abjure blood transfusions. In cases involving Jehovah's Witness children, standard practice in most states does not require parents to authorize the transfusion, but allows health care officials to authorize the transfusion by court order. See *Jehovah's Witnesses in State of Washington v. King County Hospital*, 390 U.S. 598 (1968), *summ. aff'g* 278 F. Supp. 488 (W.D. Wash. 1967) (three judge court); *People ex rel. Wallace v. Lebeaux*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

statute, by contrast, operates in advance of a tragedy, in an effort to prevent it.<sup>19</sup>

The Minnesota courts have already taken official notice of the effectiveness of the legislature's less restrictive legislative approach - ironically, in the earlier criminal proceeding against the McKowns and petitioner Tosto. *McKown*, 461 N.W.2d at 722. Inexplicably, the court below ignored this previous judicial finding--while failing to engage in any serious independent analysis of the effectiveness of the reporting requirement.

It bears mention, in this connection, that the legislative reporting requirement is patterned after laws requiring parents to report contagious diseases. Such laws have been in existence in most states for decades and are scrupulously obeyed by Christian Scientists. Pet. App. 36a. The Founder of Christian Science herself recommended that adherents comply with these reporting laws, and the materials published by the Church to this day do so likewise. *Mary Baker Eddy, The First Church of Christ, Scientist, and Miscellaneous* 219-220 (1913). Given the success of contagious disease reporting, mere speculation that notice requirements might not "always work" is an insufficient basis for refusing to recognize the Minnesota statute as a less restrictive alternative that would protect constitutional rights. See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 543 (1979); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 130-31 (1988).

*Separation of Powers.* The decision below also brings to the fore the separation-of-powers dimension of less restrictive alternative analysis. The job of the courts, in constitutional cases, is to check legislative action that too zealously pursues

<sup>19</sup> Moreover, the tort remedy will come into play only when the next-of-kin was not involved in the choice of spiritual treatment. When families are intact and united in their beliefs (probably the more common situation), there is no one to bring suit.

### C. The Court Of Appeals' Reasons For Rejecting This Less Restrictive Alternative Are Inadequate

The Court of Appeals rejected petitioners' argument that the reporting statute is a less restrictive alternative with the observation that a reporting requirement "does not always work and therefore is not a preclusive alternative." Pet. App. 28a. This perfunctory dismissal of petitioners' constitutional claim was grossly inadequate and in conflict with this Court's precedents. Moreover, by substituting its own view of public policy for that of the legislature, the court violated fundamental principles of separation of powers.

*Adequacy of the Alternative.* Under this Court's case law, the question is whether a challenged provision restricts constitutionally protected conduct substantially more than is necessary. *Schwabburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980); *Turner Broadcasting, supra*. The Court of Appeals' decision cannot be squared with this approach. The question is not whether the reporting requirement will "always work." Conventional medicine does not "always work." A common law tort suit does not "always work." And if perfection were the standard, the requirement of choosing a less restrictive alternative, which effectively (though not perfectly) furthers the state's interest, would be reduced to a nullity. This Court should not permit erosion of this vital aspect of constitutional jurisprudence.

There is every reason to believe that the legislature's reporting requirement, Minn. Stat. § 626.556, will be at least as effective as a common law tort action in protecting the children of Minnesota. The tort action serves only to punish, deter, and compensate - *after* a child has died. The reporting

office is not the least restrictive means of furthering state interest in integrity of the judiciary); *Publicker Industries v. Cohen*, 733 F.2d 1059, 1074 (3rd Cir. 1984) (trial judge's decision to exclude press from trial was not least restrictive means where judge had not considered alternative of bifurcating trial).

Other courts perfunctorily dismiss arguments of this sort, deferring almost automatically to government claims of "necessity." See, e.g., *Gwin v. State Ethics Commission*, 262 Ga. 855, 426 S.E.2d 890, 892 (1993) (court upholds statute prohibiting regulated entities from contributing to political candidates for the office of regulator, asserting conclusory that the ban is narrowly tailored "[i]nasmuch as the regulated entity is free to contribute to all other political campaigns"); *State in Interest of C*, 638 P.2d 165, 173 (Wyo. 1981) (removing child from custody of parent "to achieve the State's interest in the welfare of the children was one of the 'least intrusive' under the circumstances \* \* \*") (emphasis added).

Lower courts, including the court below, have rendered conflicting decisions on the extent to which a court must consider a proposed alternative that may be only slightly less effective in achieving the government's interest, but is significantly less restrictive as to the protected right at issue. As noted, the court below held that a less restrictive alternative must "always work" if it is to be accepted. Only slightly more accommodating, other courts have held that a state regulation is invalid in the face of a less restrictive alternative only where the alternative is "just as effective in achieving" the regulatory goal. *Dial Info. Serv. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992). Still other courts weigh the effectiveness of the proposed alternative against the degree to which it would lessen the burden on the asserted individual right. See *Alliance for Community Media v. FCC*, 56 F.3d 105, 124 (D.C. Cir. 1995) (en banc) (balancing effectiveness

state interests at the price of constitutional freedoms. It is not the judicial function to limit legislatively-recognized constitutional freedoms for the purpose of more zealously pursuing state interests. The legislature is the front-line guardian of the public interest, and where it has determined that the public interest is satisfied without unduly trammeling constitutional rights, courts are not empowered to second-guess that judgment.

If certiorari is granted, petitioners will contend that where the legislature has explicitly addressed an issue touching on constitutional rights and crafted what it considers to be a balanced and appropriate legislative response, a court is obligated to presume that the legislative solution is an adequate means to achieve the governmental purpose, at least in the absence of powerful evidence to the contrary.

#### D. This Court's Guidance Is Needed To Resolve Conflicts In The State And Lower Courts Over The Requirement Of Adopting The Least Restrictive Alternative

The decision below is all too typical of the haphazard and conflicting approaches many lower courts take toward constitutional arguments based on less restrictive alternatives. In some instances, courts painstakingly examine proposed alternatives and allow constitutional restrictions only when the alternatives are plainly inadequate to achieve the government's purposes. See, e.g., *Church of Jesus Christ v. Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990) (county rezoning procedure was not least restrictive means of maintaining "site control" where subjective factors resulted in denial to church of a development permit); *ACLU v. The Florida Bar*, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990) (ban on speech on issues of public dispute by candidates for judicial

and restrictiveness of alternatives); *Altman v. Television Signal Corp.*, 849 F. Supp. 1335, 1342 (N.D. Cal. 1994) (striking down an absolute ban on indecent leased or public access programming in the face of the "adequate" though marginally less effective alternative of channel blocking).

Perhaps one reason for the inconsistency among lower courts is that this Court has never explained precisely what "less restrictive means" analysis entails. This case thus offers an opportunity for clarification that can reduce the present level of confusion and inconsistency in the lower courts.

## II. THE DECISION BELOW CONFLICTS WITH LOWER COURT DECISIONS HOLDING THAT THE IMPOSITION OF LIABILITY ON CLERGY FOR THE ALLEGEDLY NEGLIGENT CONDUCT OF THEIR RELIGIOUS FUNCTIONS IS UNCONSTITUTIONAL

Liability against petitioner Mario Tosto in this case was predicated solely on a jury's judgment that he had negligently or unreasonably performed his function as a clergyman. Tosto was engaged by Mrs. McKown solely for the purpose of praying and providing *spiritual* treatment for Ian. As a Christian Science practitioner, recognized as clergy under Minnesota law, Tosto performs no medical services whatsoever, is entirely untrained in the medical perspective on disease, and need not even physically attend the sick person. A Christian Science practitioner does not advise patients about whether to rely on spiritual healing. His sole function is to assist, through prayer, those who decide to pursue the spiritual approach to healing.

The jury was empowered to decide whether Tosto performed these religious functions "reasonably," and concluded that he had not. The Court of Appeals, upholding the judgment against Tosto, held that he was under a legal

obligation "to persuade Kathy McKown to summon a physician for Ian or, failing that, to do so himself." Pet. App. 38a. Although the court did not label this form of liability "clergy malpractice," that is what it is, and it has been found unconstitutional by other state and lower federal courts. *Schmidt v. Bishop*, 779 F. Supp. 321, 327-28 (S.D.N.Y. 1991); *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898, 490 N.E.2d 1319, 1325, cert. denied, 479 U.S. 915 (1986); *Brown v. Laitner*, Mich. Ct. App. No. 73903 (Dec. 17, 1986), order granting leave to appeal vacated, 432 Mich. 861, 435 N.W. 2d 1 (1989); see also *Nally v. Gross Community Church*, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948, 960 (1988), cert. denied, 490 U.S. 1007 (1989) (citing constitutional concerns in the course of rejecting clergy malpractice claims as a matter of common law). In particular, the California Supreme Court has rejected the argument that a clergyman should be held legally obliged to refer a person needing medical attention to such a speciality. *Nally*, *supra*.

The reason for the rejection of "clergy malpractice" causes of action was well stated in *Schmidt*:

Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of this community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.

779 F. Supp. at 328. It is no business of secular courts to regulate the way Christian Science practitioners conduct their spiritual work.

The Court of Appeals' imposition of liability on petitioner Tosto is in clear conflict with other lower court cases, and necessitates review by this Court.

### III THE IMPOSITION OF CIVIL LIABILITY FOR CONDUCT REASONABLY DEEMED TO BE PROTECTED BY A RELIGIOUS ACCOMMODATION STATUTE VIOLATES DUE PROCESS

It is undisputed that petitioner Kathy McKown was aware of, and tailored her conduct in reliance on, Minnesota statutes that (as the state courts have recognized) appeared to authorize reliance on spiritual treatment for Ian. If the \$1.5 million verdict is left standing, these statutes will have been not so much an accommodation to the free exercise of religion (as the legislature intended) as a trap for the unwary--and ironically, for those most conscientiously obeying the law.

This case therefore raises due process questions of nationwide importance. As noted above, the Minnesota statutes on which Kathy McKown relied are similar to the statutes of over 40 states. Moreover, it is already clear that this case is of nationwide concern to Christian Science parents, who may be placed in a situation of grave uncertainty about the nature of their parental rights and responsibilities, with no fair notice of what the law demands of them.

It is well established that due process standards apply with heightened vigor when First Amendment rights are at stake. As this Court has explained, "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455

U.S. 489, 498-99 (1982). While "economic regulation" is subject to a "less strict" due process test, a "more stringent" test is required when "the law interferes with the right of free speech or of association." *Id.*; accord, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). See generally Laurence H. Tribe, *American Constitutional Law* §14-11, at 1034 (1988); Henry Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). Although no case of this Court explicitly so holds, petitioners assume that the same heightened degree of protection is accorded rights protected by the Free Exercise Clause.

There is little question that these due process principles of fair warning were violated by the courts below. The Supreme Court of Minnesota has already held that it was reasonable (though erroneous) to have relied upon the spiritual treatment provision no matter how grave the illness. *McKown*, 475 N.W.2d at 68. Yet the same state courts held that petitioners were unreasonable when they acted upon that understanding and did not turn to medicine. Due process does not tolerate such contradictions.

In affirming the dismissal of the *McKown* manslaughter indictment, the Supreme Court of Minnesota held that it would be fundamentally unfair to permit a manslaughter prosecution here because the state had "clearly expressed" its permission for caregivers to "depend[] upon" spiritual treatment without indicating that such permission was limited to non-threatening cases. *Id.* Petitioners were therefore reasonable in believing they had no duty to turn to medicine because: "The spiritual treatment and prayer exception to the child neglect statute expressly provided respondents the right to 'depend upon' Christian Science healing methods so long as they did so in good faith." *Id.* (emphasis supplied)

Note that the judicial finding of unfairness that triggered dismissal of the indictment did *not* rest upon a conclusion that the statutory scheme was "vague." Indeed, the problem was

just the opposite. The spiritual treatment exception appears to speak precisely, and without limitation, in expressing the state's "intention to permit good faith reliance on spiritual treatment and prayer as an *alternative* to conventional medical treatment . . . ." *Id.* (emphasis supplied) In other words, the statute misled those who cared for Ian, not because it was vague, but because its very specificity lulled them into believing that the state had *authorized* that form of treatment in all circumstances even if an illness appeared to be life-threatening.

The court below declined to recognize the due process violation solely because this proceeding is civil, not criminal, in nature. Pet. App. 30a. Although this distinction between civil and criminal sanctions is important for some due process purposes, it is beside the point when the issue affects First Amendment rights. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of [sorts]." *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964). See also, *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (due process principles apply to any state action depriving a defendant of liberty or property regardless of what the proceeding is called). If certiorari is granted, petitioners will argue that the same heightened standards of fair notice that apply to conduct in the criminal context apply to First Amendment-protected conduct even in the civil context. If the legislature enacts a statute that reasonably appears to protect conduct protected by the Free Exercise Clause, it violates the Due Process Clause for the State to impose civil liability on believers who act in reliance on the statute.

This is a case in which the legislature was wiser and more protective of constitutional freedoms than the court. The Minnesota legislature was able to chart a course that would achieve the State's unquestioned interest in protecting the health of children and at the same time enable members of this

religious minority to continue to practice their faith and their alternative approach to healing. For this legislative accommodation to be ignored--and over a million dollars in liability imposed on these four people for their exercise of religion in reliance on the legislative provision--makes a travesty of the constitutional ideals of free exercise of religion and due process of law.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 29, 1995

Respectfully submitted,

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**SENATOR HATCH'S ADDITIONAL QUESTIONS**  
**RELIGIOUS LIBERTY PROTECTION ACT HEARING**

**Questions for Professor Michael McConnell**

**Instructions:**

The questions below are grouped very roughly by subject matter for ease of use, but please do not feel bound by the headings or groupings in any way. Some of the questions below are directed to an individual, but please feel free to respond to all of the questions that you can formulate a helpful answer to. To the extent you can, please indicate what legal or theoretical source you base your conclusions on for each question.

**SPENDING:**

1. Has Congress not frequently imposed general conditions on the receipt of federal funds, such as the requirement in Title VI that no program receiving federal funds may engage in racial discrimination? How is RLPA, insofar as it relies on the Spending Clause, any different?
2. Professor Hamilton objects to the RLPA as ultra vires under the Spending and Commerce Clauses, citing Boerne. Professor Hamilton, could you explain what the Boerne decision has to do with whether RLPA is a legitimate exercise of Congress' Commerce Clause or Spending powers? Are "proportionality" and "congruence" relevant to the limits of Congress' power to regulate commerce or to put limits on the use of federal funds?

**COMMERCE:**

3. Could each of you explain what you believe is the test, in your view, for determining whether this legislation is a legitimate exercise of Congress' power under the Commerce Clause? What case law support is there for your interpretation of the Commerce power?

**FREE EXERCISE PROCEDURAL ENFORCEMENT:**

4. Professor Eisgruber objects to the burden-shifting provision of Section 3(a) of the bill as "attempt[ing] to deprive the courts of the authority to interpret the Constitution" and as specifying a "rule of decision" for the courts. Professor Hamilton objects to provisions of S. 2148 on the basis of Marbury v. Madison, presumably for similar reasons. How can that be, given that the bill requires a showing of a constitutional violation under the courts' current jurisprudence and leaves the ultimate legal standards and decisions to the courts?
5. Is the burden-shifting provision of 3(a) not wholly consistent with other civil rights laws?

**SEPARATION OF POWERS:**

6. Assuming that the subject matter regulated by RLPA is within Congress' power to

regulate under the Commerce and Spending Clauses, do you really think there is an independent separation of powers problem with this bill?

7. If the answer to the above question is "yes," do you think Congress has power to impose a compelling-interest test within those areas governed by its enumerated powers, as long as it does so with the intent to protect religious freedom, and not with the intent to "overrule" or "second-guess" the Supreme Court's decision in *Smith*? If so, why should the constitutionality of the legislation turn on our intent in passing it?
8. Professor Hamilton, in response to a question about whether the test of constitutionality was Congress' motivation, drew a distinction between Congress' motivation and the legislation's purpose and asserted that this difference was grounded in case law. What is this case law, and do any of the rest of you see the same distinction? What is the proper test of constitutionality, legislative motive, purpose, a structural/power inquiry, or something else?
9. Professor Hamilton asserts that the RLPA violates Article V's ratification provisions. This would suggest that Congress can do no legislating in constitutional subject matter areas beyond the minimum constitutional requirements. But does that reading not undermine Professor Hamilton's and Professor Eisgruber's allowance that Congress could adopt some religion-protection legislation, just not this? And does not that reasoning also suggest that a whole host of civil rights legislation is constitutionally suspect since protections for many groups under federal legislation goes beyond the mere constitutional requirements?

#### **FEDERALISM:**

10. The Supreme Court has signaled that it is willing to enforce limits on federal power. But do the *Printz*, *Lopez*, and *New York v. U.S.* cases stand for the proposition that Congress cannot displace or preempt state laws, or lift the burdens of state laws? How does S. 2148 relate to these cases?

#### **SOVEREIGN IMMUNITY:**

11. Could each of you state your understanding of how S. 2148 accords with the *Seminole Tribe* case regarding state sovereign immunity?

#### **LAND USE RULES:**

12. Could each of you explain why the special rules regarding land use are or are not consistent with the *Boerne* decision? If not, what kind of record would be necessary to make it so?

#### **GENERAL V. SPECIFIC ACCOMMODATION:**

13. Both Professors Hamilton and Eisgruber suggest that somehow targeted exemptions for particular religions in particular situations would somehow be more appropriate than a general accommodation of religion across the board. It seems to me that such an

individualized approach to religious accommodation is the worst possible option. Religions with enough political influence may succeed in obtaining religious accommodations, but unpopular minority religions are unlikely to be successful. Isn't approaching the issue of religious accommodation on a statute-by-statute basis, rather than through a general rule, much more likely to have the effect of discriminating between religions and thereby exacerbating rather than minimizing Establishment Clause concerns? Would not such targeted accommodations be more suspect under Board of Education v. Grumet and Estate of Thornton v. Calder than a general non-discriminatory accommodation rule?

14. Is there any case-law support for the proposition that Congress can require religious accommodation statute-by-statute (for example by granting religious exemptions from Title VII or exempting Christian Scientists from Medicare/Medicaid), but cannot establish a general rule of religious accommodation without creating an establishment of religion? Is there case law support for the opposite conclusion?

**ACCOMMODATIONS GENERALLY:**

15. Professor Hamilton asserts that religious accommodation "is a zero-sum game" in that by protecting religious practice from general laws, Congress "inevitably subtracts from the liberty accorded other societal interests." [Hamilton Statement, p.4.] If this is true, is all accommodation invalid under the Constitution? What about legislative accommodations that have been upheld, or state constitutions or enactments that are more protective of religious free exercise: are they also unconstitutional?

**BETTER METHODS:**

16. Professor Eisgruber, you suggest that there are more appropriate methods of protecting religious liberty than RLPA. What are they, and why are they not more objectionable under your analysis than RLPA?

**DEFINITION OF RELIGIOUS EXERCISE:**

17. S. 2148 includes a new definition of "religious exercise" making clear that a particular action need not be "compulsory or central to" a claimant's theology to avoid having judges make theological determinations. Could each of you explain why the new definition is or is not appropriate or constitutional?

**GENERAL ROUNDUP:**

18. Is there anything raised by the hearing or the legislation that you would like to further comment on or submit to supplement any of your statements or answers?

[EDITOR'S NOTE: Responses not available at presstime.]

## ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF MARC D. STERN, ON BEHALF OF  
THE AMERICAN JEWISH CONGRESS

Article I, § 8, cl. 3 authorizes Congress to "regulate Commerce with foreign nations, and among the several States." I am not here as an expert on the *Commerce Clause*. For me to claim such expertise would border on perjury. I rather come to lay out some of the economic facts about religious life in the United States.

## I

The *Commerce Clause* is the constitutional hook on which Congress rests its authority to act, not a characterization of the interests involved. *City of Boerne* teaches that broad religious liberty protection needs to rest on an enumerated power of Congress within the list in Art. I, § 8, other than § 5 of the Fourteenth Amendment. The *Commerce Clause* is one such power on which this bill rests, albeit not the only one.

The use of the *Commerce Clause* as a hook for legislation whose political and social heart is a moral principle is hardly unprecedented. Some of the nation's most important pieces of social legislation rest on the *Commerce Clause*. The most visible (and successful) recent examples are Titles II and VII of the 1964 *Civil Rights Act*, banning racial, sexual and religious discrimination in places of public accommodation and employment. (Earlier still, Congress used this power to ban child labor and the interstate transportation of women for immoral purposes—the *Mann Act*). No one believes that the principle of non-discrimination embodied in these landmark pieces of legislation is tainted because it rests on the *Commerce Clause*. The clients I represent who seek religious accommodation in the workplace are not in the slightest offended that the Act upon which their cases is premised rests on the *Commerce Clause*. Those to be protected by the *Religious Liberty Protection Act* will no doubt also not be offended that their rights are protected by the *Commerce Clause*.

## II

We know authoritatively that many activities of religious not-for-profit corporations come within the *Commerce Clause*. The Supreme Court told us so last Term in *Camps Newfound/Owatanna v. Town of Harrison*, 117 S.Ct. 1590 (1997). The summer camps were religious, operated by Christian Scientists, to allow children to grow "spiritually and physically in accordance with the tenets of their religion." *Id.* at 1594. It challenged

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(ultimately, successfully) a preference in the operation of a real property tax exemption for camps serving Maine residents primarily as a violation of the *Commerce Clause*.

At the outset, this claim was met with the twin objections that campers were not articles of commerce, and that the camps were not in the business of making a profit, and hence that the camps could not raise a *Commerce Clause* challenge. The Court rejected these defenses:

Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, see *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964); *United States v. Lopez*, 514 U.S. 549 (1995), but also as a provider of goods and services. It markets those services, together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who are attracted to its facility from all parts of the Nation.

*Id.* at 1596.

Moreover, as we will show, the very size of an action can bring it within the *Commerce Clause* if it affects interstate commerce. *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Wickert v. Fillburn*, cited in *Hodel v. Virginia Surface Mining Assn.*, 452 U.S. 264, 308 (1981). In that case, Justice Rehnquist insisted upon a substantial effect on interstate commerce, *id.* At 310-11. Accord *Lopez v. U.S.*, 115 S.Ct. 1624, 1630 (1994). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez* also reaffirms *Wickert's* holding that the cumulative effects of small-scale economic activity can bring an activity within the *Commerce Clause*.

Much religious activity will fall within these rules. Although, perhaps *contra* to Karl Marx, religion is not primarily an economic activity, in all its various forms, institutional and personal, it surely has a substantial effect on commerce.

A caveat before I turn to the statistics. As a consequence of the American tradition that religion is not the business of government, the government appears to have relatively little relevant data. Churches are not required to file the informational return required of other not-for-profits (Form 990). The Census Bureau asks no questions about religious affiliations, nor, as best as I can discover, does it survey churches to assay their economic activity. The Department of Housing and Urban Development does a biennial survey of

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housing, and inquires into those factors which lead people to select a home, but it asks no questions about religion. (I.e., whether the presence of a church makes a difference in the selection of housing. Is the presence of a significant body of fellow believers a prerequisite for moving into a community?) The Commerce Department does keep figures on religious construction, but these may well substantially underestimate the extent of that activity.

As I will discuss, there are private studies by Independent Sector and others, notably the National Association of Fund Raising Counsel and Empty Tomb, which attempt to quantify the extent of philanthropic activity directed toward the support of religious activity. These data are imprecise in part because no government agency collects official data. Moreover, there are religious institutions involved in a variety of activities likely to come within the scope of *RLPA* which are not houses of worship, and are lumped together with other apparently secular categories. On the other hand, the possibility of some dual reporting cannot be eliminated, either. Still, the numbers I describe are the ones that experts and others in the field point to with some regularity, and in some measure, cross-check with each other.

Most churches and religious not-for-profit organizations support themselves with membership dues and fees for services. Independent Sector's 1990 survey<sup>(1)</sup> reports that 60 percent of national household charitable giving totaling 122.5 billion dollars<sup>(2)</sup> was given to religious institutions, or a total of 65.76 billion dollars. More recently some have argued that the amount of religious giving is exaggerated by some 20 percent, and that the total of giving to churches is only (!) 44 billion dollars.<sup>(3)</sup> The Not-for-Profit Almanac (1996-7), p.175 reports that revenues for religious institutions in 1992-93 were 58.3 million dollars. The Almanac also reports that religious congregations had current operating expenditures of 41 billion dollars. Some of the difference is no doubt savings or reserves, but much of the rest is no doubt spent on capital improvements—new buildings and upgrading old

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1. From Belief to Commitment (1993), p. xi.
  2. Giving USA (1990), p. 101.
  3. J. & S. Ronsvalle, How Generous Are We? *Christian Century*, June 3-10, 1998, pp. 579-80.

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ones, a fact which makes *RLPA's* zoning provisions quite important. To the extent that localities interfere with the ability of religious institutions to build, they reduce the amount of commerce in construction—much of which involves the interstate movement of goods (stained glass, furnishings) and services.

Even as to houses of worship these figures on philanthropy understate the impact of houses of worship—themselves only a subset of the religious community. According to the Almanac, income from endowments (for 1992) is another 1.3 billion dollars. In 1992, some 6 billion dollars was spent on capital improvements and new construction (Almanac, p. 190, Table 4.2), up from 4.8 billion dollars in 1987. (By comparison, all educational institutions—a category which includes many religious institutions, the figures were 6.4 and 4.9 billion dollars respectively.) In 1982, religious institutions had endowment investment income of 1 billion dollars, and spent \$800,000,000 on construction. In short, in recent years there has been a substantial leap in the amount of capital construction by religious organizations.

These figures include only current financial expenditures. Even more capital is invested in religious institutions in the form of real property and buildings, some of which have been dedicated to church use for centuries. Recent studies indicate that these facilities are used by other community groups, often at reduced rents; this multiplies their effect both on the economy and the well-being of our communities and the nation.<sup>4)</sup>

Data, however, is hard to come by. In almost all states, statistics on exempt property are maintained locally, not at the state level. I have not had the resources to compile this data piecemeal. Two states, however, do maintain such data: New York and Wisconsin.

The most recent figures for New York show 14.04 billion dollars (up from 13.5 billion dollars in the prior year) of property (in some 23,000 parcels) held as houses of worship, and an additional 3.7 billion dollars (up from 3.6 billion dollars) of parsonages. Other property used by religious organizations (cemeteries, schools, hospitals, and the like) are not

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4. Sacred Places At Risk: New Evidence of How Endangered Older Churches and Synagogues Serve Communities (Partners for Sacred Places: Philadelphia 1997).

broken out separately. This amounts to about 5 percent of the total exempt property (a category which includes government buildings and public parks).<sup>(6)</sup>

The most recent figures for Wisconsin (1996) show that church/religious property amounts to almost \$5 billion of tax exempt property, which constitutes 40.6% of all exempt private real property.<sup>(6)</sup> As in the case of New York, other property used by religious organizations are not broken out separately.

Houses of worship do not exhaust the economic extent of religious activity. At this point, though, certainty becomes even less possible. Religious enterprises include schools, hospitals, and social welfare institutions. Some of the latter two categories may be largely indistinguishable from their secular counterparts, but surely not all. Catholic and Baptist hospitals operate under a series of religious directives. These have in the past clashed with various regulations. Given the consolidation in the health care industry, it is likely that there will be more such clashes. In any event, these hospitals are a significant economic player.

The Catholic health care sector has a huge economic impact. There are 625 Catholic hospitals in 48 states; 713 long-term care facilities, and 51 HMO's in 32 states. They make up 16 percent of the total U.S. community hospital admissions and outpatient visits. They produce over \$44 billion in hospital revenues, much of which is spent, obviously, in interstate commerce in pharmaceutical and other supplies. The assets of these facilities also exceed 44 billion dollars.<sup>(7)</sup> Catholic health care systems account for 10 of the 20 largest health care systems in the country.<sup>(8)</sup> These figures do not, of course, include the large Baptist, Jewish and other religiously affiliated hospitals.

The economics of parochial schools are somewhat different than for houses of worship. To varying degrees, depending largely on the vagaries of each denomination's

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5. Statewide Summary of Exemptions by Property Group and Exemption Code, 1995 Assessment Roles, pages B.85-859, Table B.4
  6. State of Wisconsin Summary of Tax Exemption Devices, Feb. 1997, p. 100, Table 1.
  7. 1996 Profile of Catholic Health Care.
  8. Modern Healthcare Multi-Unit Providers Survey, May 20, 1996.

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organization, these institutions derive much support from tuition. Catholic schools enroll (according to the National Catholic Education Association) during the most recent school year for which figures are available—1997-98—some 2.5 million students, in 8,200 schools at an average per pupil cost of \$2,414, for a rough total of 6.24 billion dollars.

Conservative Christian schools, according to the National Center for Educational Statistics (March 1998) enroll about a half million students in 3,300 schools. Some 172,000 Jewish students attend some 688 schools. I have been unable to locate average costs for the Christian schools supplying. Applying the Catholic schools' costs to these students, gives a (conservative) total of 1.2 billion dollars.

Jewish schools are more expensive. The Avi Chai Foundation<sup>9)</sup> did a study of Jewish schools outside the New York area concerning the 1995-96 school year and non-New York Metropolitan area schools calculated an average cost of between \$5,000 and \$6,000 per student. Using the lower figure for the entire student population including those in schools in the New York area, we conclude that the tuition costs are \$860,000,000. These three streams—and they by far do not exhaust the spectrum—lead to a total of tuition costs of 8.3 billion dollars. These numbers (admittedly rough) do not include fees and charitable contributions, as well as endowment income to the schools, which educate together three-fifths of all non-public school students.

Some of the funds go to salaries; others go to textbook publishers and computer manufacturers, and sellers of school supplies, all of whom are regularly involved in interstate commerce. These institutions build and maintain buildings with supplies purchased in interstate commerce by companies which are nationwide in scope. The number of buildings (over 12,000) is itself so substantial as to necessarily have an impact on interstate commerce.

These figures include only elementary and secondary schools. But religious education does not stop there. Institutions of religious higher education also exist. I do not have figures for the economic impact of the many colleges under religious auspices, even if defined to mean school where religion plays a significant and more than a nominal role in the life of the school, but also in schools of theology. The Association of

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9. M. Shick & J. Dauber, The Financing of Jewish Day Schools, (1995).

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Theological Schools, representing mainline Protestant schools of theology, represents some 220 schools, enrolling some 65,000 students in the 1996-97 school year at an average cost to student of \$6,200 per student for a total of \$406,000,000.<sup>(10)</sup> Again, this figure would not include grants or endowment income. And it says nothing of Catholic seminaries, smaller Bible schools, or *yeshivot* (rabbinical schools).

Nor is it beyond the realm of the possible that these schools—and hence interstate commerce—would be affected by state imposed substantial burdens. During the 1980's state regulators and operators of so-called Christian schools frequently clashed. In Nebraska, where courts had upheld the broad power of regulation, many schools singly closed their doors rather than operate in violation of their religious principles. Those closures reduced purchases in interstate commerce.

Another area not included until now is that of charitable giving under religious auspices. The Chronicle of Philanthropy<sup>(11)</sup> annually lists the top 400 charities in the United States. The largest charity in the United States is the Salvation Army, with an annual income of over 2 billion dollars—and it has on several occasions clashed with the government over religious liberty and government regulation. Number 5 is Catholic charities at 1.1 billion dollars. Numbers 7 and 8 were also religious affiliates—the YMCA and Habitat for Humanity. Number 19 at one quarter of a billion dollars is Campus Crusade for Life. Many other religious charities—not individual houses of worship—are scattered through this list.

For example, Catholic charities in 1996 had a total income of \$2,154,500,000; expenditures of \$2,053,000,000; a paid staff of 46,000 people; some 230,000 volunteers; and served a total of 12,700,000 people.<sup>(12)</sup> Of people served, some 5.5 million received emergency food service of some kind. Given the nature of the food supply in this country, it is inevitable that much of this food moves in interstate commerce.

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10. ATS Fact Book (1997-98), pp. 27, 103.

11. October, 1997 pp. 1, 45.

12. 1996 Summary - Catholic Charities U.S.A.

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The Council of Jewish Federations reports that 81 of its affiliated local federations for which it has data reported \$174,904,000 of expenditures for social services, allocated as follows: family services - \$53,378,000; elderly services - \$22,070,000; health services - \$5,156,000; vocational services - \$15,274,000; group services - \$63,396,000; youth services - \$15,630,000.

So far what has been said relates to income and capital expenditures of religious institutions. Religious life also has a personal side, one which commands expenditure of funds by believers in furtherance of their religious beliefs and practices, from ritual object to ritually acceptable food to books, music and mass media. Much of these move in either international or interstate commerce.

The Christian Bookseller Association is the trade association of Christian product suppliers. It has 12,500 member stores in the U.S. selling books, records, apparel and videos. It estimates that its members do 3 billion dollars of annual business, with many stores doing over 1 million dollars a year in annual business. In 1997, it had a convention in Georgia, attended by over 13,000 people, and over 400 exhibitors from across the country and the world.

The Catholic and Jewish communities also have their own publishers and distributors of religious articles, including furnishings for synagogues and ritual objects. Increasing, these businesses work not as small local bookstores, but as catalog sales business selling objects made in various state and foreign locations across the United States. One such seller to the Jewish market, J. Levine Booksellers, started out as a small bookstore on New York's lower east side 90 years ago. Today, it does 70 percent of its business (\$2.5 million) in national mail order business.

Other enterprises sell church and synagogue furniture by mail order catalog to houses of worship nationwide, as can be seen in particular from the ads in the Catholic Directory. Copies of these will be entered in the record.

Some faiths have ritual diet requirements, and these, too, have a substantial impact on interstate commerce, and these, too, have been involved in questions of religious liberty.

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Dr. Joseph Regenstein, an expert on ethnic and religious diets at Cornell University, estimates that there are between 2 and 3 billion dollars in directed sales of kosher food, that is, sales of items where the consumer seeks out a kosher product. A total of some 35 billion dollars of food products are sold which are under rabbinical supervision. A total of 41,000 products are under rabbinical supervision. Grappa to Scones, New York Times, 12/3/97. I can speak here with personal expertise. These foods are available nationally, and their availability in the national market in ordinary groceries and supermarkets has greatly facilitated travel and business by those like myself who observe the kosher food laws. And by the same token, the transition to a national market in Kosher food has greatly simplified the life of those who in pursuit of economic advantage seek to move away for the largest Jewish communities. Kosher food is now more or less available everywhere. One large producer, Manishevitz, distributes its products to more than 18,000 supermarkets (out of a national total of 30,000 stores),

This development has had important implications for the kosher food industry. In *Schacter v. U.S.*, 295 U.S. 495 (1935), the so-called sick chicken case, the Supreme Court invalidated the National Industrial Recovery Act at the behest of a small wholesaler of kosher chickens who purchased some live chickens from other states, but who slaughtered, dressed and sold the chickens for the local market. That was the typical pattern in that era—and again I speak from personal experience because my grandmother (coincidentally named Schacter—the name means ritual slaughterer) owned a small poultry store at the time.

Today, the industry is different as is *Commerce Clause* doctrine. Almost no poultry is ritually slaughtered at the point of sale. Most is slaughtered and prepared by a few large companies. Hebrew National (owned by Conagra), Empire (located in Mifflintown, PA) and Rubashkin (Agra-processor located in Pottsville, Iowa). These companies distribute their products nationally—as a trip to almost any supermarket will disclose. The same pattern holds for beef with Hebrew National, Sinai/48 (owned by Sara Lee) and Rubashkin increasingly dominating the market and pushing out of business small local sellers—in just the way small hardware stores have yielded to large national chains like Home Depot.

The Muslim community too, has some dietary restrictions, notably with regard to the slaughter of beef and the avoidance of pork. It has three or four supervising agencies

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(there are some 80 or 90 Jewish agencies, but only 4 national ones), one of the biggest of which is the Islamic Food and Nutrition Board of America located in Illinois. Much of the work of the councils involves certifying the export of American products for the overseas Islamic market.

This change from small, local providers of ritually acceptable foods to large, national ones, has already had an impact on litigation. Thus, in *National Broiler Council v. Voss*, 44 F.3d 740 (CA 1994), California prohibited chickens chilled to below 25°F from being sold as fresh. Because many chickens sold in California were shipped in from out-of-state, this rule had the effect of favoring a few small, in-state producers over the larger, national firm. This impact affected kosher producers as well, the larger, national producers being out-of-state. The Ninth Circuit held the California regulation preempted under the *Poultry Products Inspection Act*, an exercise of Congress' power over interstate commerce.

There is a domestic market as well. I spoke to the manager of the largest Hallal market in the Washington area, Hallalco in Falls Church. Hallalco does its own slaughtering. Much of its work involves the slaughter of local beef within Virginia, but when the supply of local beef is insufficient, Hallalco imports live animals for slaughter from Texas. It has now began slaughtering operations in Maryland. It does not produce its own Hallal delicatessen. These it imports from a Hallal producer in Iowa.

What has been said does not begin to exhaust the extent of the economic impact of churches on interstate commerce. I have not discussed religious broadcasting, nor the many large religious conventions. Does anyone think that Salt Lake City welcomed the Southern Baptists because of their desire to proselytize Mormons? Religious conventions, like other conventions make a real economic contribution to a community. Multiply that by all the conventions held yearly, to say nothing of large revivals, and again the cumulative impact on the national economy is substantial. Add to that the funding that flows from around the country to national and international affiliates or parents of the local religious organization, and one again confronts an important factor on the national economy. I am sure that economists could tell you how that sum multiplies through the economy. Even

without it, the impact of religion on the economy is significant to allow Congress, should it choose to do so, to protect this segment of the economy.<sup>(13)</sup>

### III

The simple fact is that the *Commerce Clause* has frequently been applied to religious activities. *Camp Newfound*, cited earlier, unequivocally establishes that religious institutions can claim the protection of the *Commerce Clause* even though they are not in the business of making money. Presumably, if such institutions can claim the benefit of the dormant *Commerce Clause*, whose existence is disputed by some Justices of the Supreme Court, it would seem to follow that Congress can invoke the *Clause* as an affirmative grant of power to protect the viability of this sector of the economy.

It would be particularly odd if this were not the case because the courts, including the Supreme Court have routinely applied *Commerce Clause* legislation to church activities. Thus, in *Tony and Susan Alamo Foundation v. United States*, 471 U.S. 290 (1985), the Court upheld the minimum wage provisions of the *Fair Labor Standards Act* to businesses which were part of a church's ministry. In *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (5th Cir. 1991), the Court upheld the application of the *National Labor Relations Act* to the non-teaching staff of a religious home.

Courts have upheld application of various *Commerce Clause* anti-discrimination laws to various religious institutions. See, e.g., *Lukasewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D. Pa. 1991) (age); *EEOC v. Southwestern Seminary*, 651 F.2d 277 (5th Cir. 198) (religious, racial and gender discrimination); *Brock v. Wendell's Woodwork, Inc.* 867 F.2d 196 (4th Cir.1989) (child labor).

One could multiply examples. Religious broadcasting, itself a multi-billion dollar enterprise, is subject to the Federal Communication Commission's regulations, again based on the *Commerce Clause*, in the same way that secular broadcasters are. Ritual slaughter is subject to the federal *Humane Slaughter Act*, and the processing of kosher food is subject to the FDA supervision, all under the *Commerce Clause*. It is, it seems to

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13. That Congress has the power to regulate religion does not mean that it should do so lightly.

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me, hard to sustain the proposition that religion is commerce for purposes of regulations which may limit its reach, but it is not commerce when it come to legislation which allows it to flourish.

Congress frequently has utilized its power under the *Commerce Clause* to foster business which operates interstate. Sometimes this requires the limitation of the power of states to tax, a power Congress is considering exercising with regard to the Internet. Sometimes it provides that national rules for the operation of an industry preempt local regulation, notably in the case of transportation. No one could run a railroad if each state could regulate the times of operation, and the types of equipment which could be utilized. Congress long ago exercised its power to protect interstate commerce by preempting contrary state regulations.

Religious enterprise depends on the ability of citizens to exercise free religious choice, not only to the bare holding of beliefs, but to putting them in practice. An important segment of interstate commerce would evaporate if states decide to ban ritual slaughter as inhumane, as several European countries do. Municipalities that ban religious structures altogether restrict commerce in services and materials designed for the church market. If Congress can protect the Internet by barring state laws which would interfere with its functioning, such as taxes and libel laws, why can it not protect the practice of religion which also has an impact on the economy? I think there is no relevant distinction.

#### IV

I have also been asked to address the question of the impact of the *Religious Liberty Protection Act* on the civil rights laws. This question has arisen not only in regard to *RLPA*, but with regard to state religious freedom statutes. Probably no question surrounding *RLPA* has been discussed with greater passion than this one.

Let me note first that many civil rights acts already contain substantial exemptions for religious institutions. Thus, Title VII of the 1964 Act allows religious corporations to engage in religious discrimination without restriction. At least as to not-for-profit corporations, this provision is constitutional even as to positions with no religious content. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Killingier v. Sanford*

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*University*, 113 F.3d 196 (9th cir. 1997). In *Amos*, the Court left open the question of whether the exemption applied to for-profit corporations and whether if so applied it was constitutional. Justice Brennan indicated that he thought such application unconstitutional. Title VIII allows religious corporations to engage in religious discrimination in the operation of housing owned by them. New York State's Human Rights law allows religious organizations the right to engage in any form of discrimination if necessary to further its religious purposes. (The exact scope of the exemption is unclear. The one case to reach the New York Court of Appeals gave the section a narrow reading—*Schacter v. St. Johns University*, 84 N.Y.2d 120 (1993).) The proposed federal gay rights legislation (*ENDA*) has a broad exemption for not-for-profit organizations, negotiated by gay rights groups and religious organizations, at least some of whom could not support the legislation without such an exemption, but could support it with it.

In addition to these statutory exemptions, courts have uniformly refused to intervene the decision of a church to hire or fire ministers, even where there are allegations of racial or secular discrimination outside the scope of the statutory exemptions.

The federal statutory exemptions are both narrower and broader than *RLPA* would be. They are narrower in that they generally apply only to religious discrimination by religious corporations, and *RLPA* would in theory apply to all forms of discrimination by religious institutions and religious individuals. The statutory exemptions are broader—and the significance of the point cannot be overestimated—because they are total and absolute. No matter how important the interest in eliminating a particular form of discrimination, an organization exempt under the statute wins. Not so under *RLPA*. A person or institution claiming under *RLPA* must overcome the government's showing of compelling interests—experience indicated that the barrier will frequently be insurmountable.

How great is the likelihood that *RLPA* would be used to frustrate the important policies behind the civil rights acts question that should be addressed before one discusses whether *RLPA* should or should not reach these statutes. Based on past experience in the years predating *Employment Division v. Smith*, 494 U.S. 872 (1990) the answer as to race is clear—not likely at all. Bans on sexual discrimination will survive *RPLA* analysis most of the time. There is not much case law for other forms of discrimination, although we have some indications for marital status. There has been a fair amount of litigation as

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regards marital discrimination, but almost none with regard to sexual orientation discrimination.

The leading case with regard to racial discrimination is *Bob Jones University v. Simon*, 461 U.S. 574 (1983). There a religious university lost its tax exemption because it enforced a ban on inter-racial dating. The University challenged the decision on, *inter alia*, the grounds that it denied it the Free Exercise of religion. The argument merited only a footnote, in which the Court easily found a compelling interest. I do not know of a single subsequent case in which the claim was advanced that racial discrimination was religiously based and hence immune from regulation. If made, I have no doubt that it would be rejected.

Claims of sexual discrimination in employment are more frequent. Typically, the cases have arisen in the context employment by a religious organization, there being to the best of my knowledge no claim by a private for-profit employer that his or her religion required discrimination against women, and certainly no such claim has ever been—nor is it likely that one ever would be—upheld. This is not surprising, given the general tendency of the law to equate sexual discrimination with racial discrimination. Title VII's exemption for religious institutions is inapplicable because it deals only with religious discrimination.

A typical case is *EEOC v. Pacific Press*, 676 F.2d 1272 (9th Cir. 1980), involving the publication arm of a church. On the grounds that women should not be heads of households, Pacific Press paid women workers less than men. It offered a religious liberty defense, roundly rejected by the Ninth Circuit.

Less even in results are cases involving parochial school teachers. A typical case involves the single female teacher who becomes pregnant out of wedlock. The school claims such teachers are "ministers" and that it can insist that ministers set a moral example. The response typically is that the school does not enforce a similar rule as to male teachers who have sex out of wedlock. The case law is divided on this subject. *See, e.g., Dolter v. Wahlert H.S.*, 483 F.Supp. 266 (N.D. Iowa 1980). The Supreme Court once considered a slight variation on this theme. A parochial school refused to allow mothers (but not fathers) of young children to teach because it believed mothers should be home with their children. The state claimed a compelling interest in ending such sexual role

casting, no doubt an important and impelling interest, but which in this case came perilously close to amounting to the suppression of a religious idea. *See Hurley v. Boston Gay & Lesbian & Bisexual Group*, 515 U.S. 587 (1995). The Supreme Court decided the case on procedural grounds. *Ohio Civil Rights Comm'n v. Dayton Christian*, 477 U.S. 619 (1986). The case subsequently settled.

These cases are typically outside statutory exemptions because they involve sexual, not religious discrimination. At least in the context of the parochial school teachers, they also come close to the rule of non-interference in the selection of ministers. On the other hand, they also expose children to sexual stereotypes which the state surely does not wish to see perpetuated. In short, these are hard cases and do not for me admit of across the board answers. And, indeed, the courts have not given uniform answers, differing both on their statements of the legal balance to be struck and on their evaluations of the specific facts observed in each case. *RLPA* would not change this result.

What can be said with certainty about these cases are the following propositions:

- (1) claims for outright race and sex discrimination outside the ministerial or teaching professions are almost certain to be rejected;
- (2) for-profit employees, and by extension private persons under the statutes (*i.e.*, public accommodation laws) will not be heard to successfully argue that *RLPA* exempts them from civil rights law compliance;
- (3) when the compelling interest test was the law, *i.e.*, before *Employment Division v. Smith*, the free exercise defense was rarely made successfully with regard to sex discrimination, and never with regard to racial discrimination;
- (4) the cases where a free exercise claim was given serious consideration involved substantial and conflicting values, which should not be summarily and broadly decided; and
- (5) the existence of the ability to raise such claims, sometimes even successfully, did not in any substantial way impede national progress toward reducing the general incidence of illicit and invidious discrimination.

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I know of no denomination that purports to regard racial discrimination as a religious duty. Most, if not all, regard it as a heinous sin. And while there still is substantial disagreement over sex roles, I am unaware of any church or religious organization which encourages its followers to discriminate against women in the private workplace. These facts do not eliminate the possibility of a religiously based claim to practice discrimination in the workplace, but they greatly reduce its likelihood.<sup>(14)</sup>

The hardest questions involve relatively new civil rights—those of marital status and sexual orientation. As to the latter, there has been as yet relatively little litigation, in part because these statutes tend to exempt religious organizations. This is the case by terms of New York City's "gay rights" law, and presumably most other gay "rights" laws because they fit into the general framework of human rights laws which have such exemption. In the case of New Jersey, where the legislation seemed (at least to one church) unclear on whether the ban on sexual orientation discrimination would apply to its hiring of youth ministers and the like (perhaps because the statute exempted only religious discrimination by religious groups). After lengthy procedural battles, the state conceded that the statute would not apply to such decisions in keeping with the general rule that courts will not police the hiring of ministers. These exemptions for religious organization would continue under the proposed *ENDA*. Thus, to the extent that *RLPA* would be invoked by religious organizations would break no new ground, and change nothing.

*RLPA* would be available to private parties seeking to avoid "sexual orientation" discrimination. Such challenges were available under *RFRA*, and none seem to have been brought. The closest case is one involving the discharge of a public official who criticized homosexuals. The court found that the state had a compelling interest in ensuring an end to sexual orientation legislation, sufficient to justify discharge of the official. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997). While not dispositive, perhaps, of the rights of private parties, I think the decision is indicative of the likely result—that an end to discrimination on the basis of sexual orientation furthers a compelling interest.

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14. Take the recent case of the truck driver who refused to do long distance runs with a female partner, who would sleep in the back of the truck cabin. As I understand the case, he did not claim that women should not be truck drivers, only that he should be assigned a different partner. I believe he lost even this claim.

Case law on the question of claims for exemption from bans on marital status discrimination are mixed. Alaska, in *Swanner v. Anchorage Equal Right Comm'n*, 874 P.2d 274 (1994). California reached the same result, but by different (and quite questionable) reasoning in *Smith v. FEHC*, 12 Cal.4th 1143 (1996). Massachusetts, however held in *Attorney General of Massachusetts v. Desilets*, \_\_\_\_\_ Mass. \_\_\_\_\_ (1994), that a private landlord was entitled under the state constitution to prove that the state's interest in making housing available for cohabitating couples was not seriously compromised by allowing a small landlord with religious exemptions to such rentals not to do so. Illinois and Minnesota have each had similar cases, but neither resulted in an opinion on the issue confronting the Committee today.

Against this background, it can be said that the courts have not rushed to allow religious freedom claims to trump civil rights claims. With regard to marital status, where we have more litigation, the most that can be gotten from the only decision to (partially) favor a religious landlord is that she or he might be exempt if their personal refusal to rent to unmarried couples will not significantly affect their chance for finding housing and only in such circumstances will such a claim succeed.

Now it is fairly debatable whether the purpose of the ban on marital status discrimination is only or primarily to ensure the availability of housing—or if it is also to prevent the psychological and social stigma caused by such discrimination, in which case it may be wrong. Either way, however, the practical effects of following *Desilets* would still be, in practical terms, very small. Surely no large, or even mid-sized commercial landlord would be able to use *RLPA* to avoid compliance with an anti-marital status discrimination ordinance.

Understandably, precisely because there is in our society an ongoing moral debate about the wisdom and morality of granting unmarried couples and gay and lesbian couples equal rights with traditional heterosexual married couples, those who favor equal rights for these groups—as my organization does—are reluctant to countenance exemptions because they may be seen as encouraging wide-spread evasion of the newly adopted legal norms against discrimination.

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I understand the argument, but am not persuaded that it is so powerful that it ought to foreclose inquiry into whether the state's interest is sufficiently important to outweigh the burden on religious practice.

First, given the importance of egalitarianism in our political and legal culture, it seems unlikely that allowing the inquiry will result in any wide-scale sanctioning of invidious discrimination. Second, there are cases nominally within the scope of the anti-discrimination laws where exemption is certainly appropriate, such as the case of the pro-life printer sued under the public accommodation law for refusing to print pro-choice flyers, or the Catholic church sued for refusing to rent a parish hall to one of its theological critics. Exempting civil rights from *RLPA* would leave these cases untouched. Third, in the analogous area of clashes between the freedom of association and the rights to be free of discrimination, the Supreme Court, applying compelling interest analysis, has refused to follow a *per se* rule, preferring instead a case-by-case adjudication. Compare *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) with *Hurley v. Irish-American Gay & Lesbian & Bisexual Group*, 515 U.S. 587 (1995). No reason appears why the right of religious practice should not be treated the same way. Fourth, it bears repeating again, that *RLPA* does not command blind deference to religious objections to complying with the civil rights laws, or any other law. It compels only a second look; a weighing of competing interests. *RLPA* does not cut a wide swathe through the civil rights laws.

Allowing religious claims to be heard accords those who hold them a level of moral respect and seriousness which in my experience greatly facilitates acceptance of any ultimate judgment compelling compliance with the civil rights laws. That alone would be an important reason not to exempt civil rights laws from *RLPA*'s reach.

A second reason is political. Consider *ENDA*. Would its chances of passage be enhanced or reduced if religious believers thought it would apply to youth ministers or Sunday school teachers, or church day care? *RLPA* goes even less far—because it is not a blanket exemption, but only a second look—but it does make legislation in many controversial areas more palatable to religious believers of both left and right. And excluding civil rights laws from *RLPA* would simply fuel endless calls from supporters of this or that cause to place their cause beyond question.

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The third reason is, I think, most important. On issues such as marital status and sexual orientation there are profound moral differences in this society. Those moral debates are serious, weighty and unresolved. Exempting civil rights claims from *RLPA* amounts to a declaration that some principles are beyond serious question, are not, in fact, morally serious. At least with regard to marital status and sexual orientation that is surely not factually accurate, whatever view one ultimately takes on both the underlying moral issue or the narrower question of how a *RLPA* claim should be resolved. (It may be true with regard to race, but as to such claims there is only a slightly greater than zero chance that such a claim would prevail.) So declaring would alienate many morally decent individuals, relegating their most deeply held moral beliefs to beyond the pale.

If there were a serious danger that even considering the claim for exemption would threaten this nation's fundamental egalitarian commitment, there might be reason to exempt civil rights laws from *RLPA*. But in my judgment, that is not the case. I recognize that discrimination still exists, and its victims are understandably reluctant to tolerate any questioning of their right to equal treatment. But in my judgment, it is not the case. The commitment to equal treatment is too well settled, too broadly and deeply held, to be shaken because in some few instances we allow those with profound moral objections to particular policies to question these egalitarian values, and perhaps in some even smaller number of cases, exempt themselves from them. To do so is simply to acknowledge that our society honors numerous values, equal treatment being one, and religious liberty another, and we must, if at all possible, do our best to honor both.\*

Marc D. Stern

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- \* I gratefully acknowledge the excellent research assistance of Douglas Heffer of Colby College, and Abigail Epstein, of the Hebrew Academy of Long Beach.

\* \* \*

*AJ Congress*

\* \* \*

American Jewish Congress  
 Stephen Wise Congress House  
 15 East 84th Street  
 New York, NY 10028-0458  
 212 879 4500 • Fax 212 249 3672

June 22, 1998

Dear Senator,

On behalf of the nationwide membership of the American Jewish Congress, we are writing to urge you to co-sponsor and support S. 2148, the Religious Liberty Protection Act (RLPA), which was introduced earlier this month by a distinguished, bi-partisan leadership group in both the Senate and the House of Representatives. We are proud to have played a role in the drafting of this bill, a role that was consistent with our agency's long-standing commitment to religious liberty.

Religious liberty is so much a part of the American heritage that it is too often taken for granted. In the course of drafting RLPA, and RFRA (the Religious Freedom Restoration Act) before it, we have repeatedly been told that there is no need for legislation protecting the right of religious practice, that it is secure by common assent, long-standing practice and tradition.

We believe, however, that that happy tradition is in danger not because of any broad-scale attacks on religion, but because the regulatory and bureaucratic state is often too rigid and unbending to accommodate the multitude of religious practices which today characterize the religion of Americans. It is often far easier to plead unbending adherence to a rule or practice than to undertake to determine if it is possible to satisfy the needs of government — where these are truly important — and the right of religious practice. RLPA tells governments that, to the extent Congress has the power to do so, it must make the effort.

RLPA does not command that religion must always trump. It would not create a class of citizens who would be immune from the law by virtue only of their religious beliefs. Instead, it proclaims that government has not only an interest in enforcing its laws and regulations, but a duty to respect the religious traditions of its citizens, and that this interest is important enough to require a second look at any practice which impinges on those traditions. RLPA presumes that government is not separate and apart from its people, who must servilely bow to its every whim, but their servant, who must respect their liberties.

RLPA has been carefully drafted to comport with the restrictions on congressional power underlying the scheme of federalism. It rests on Congress' power to insure that all citizens may enjoy programs financed with their tax dollars, and on Congress' undoubted power to regulate interstate commerce. The bill breaks no new constitutional ground in reliance on either power.

RLPA is the product of many months of cooperative effort of religious and civil liberties groups (as well as the skilled assistance of various members of Congress and their able staffs) whose political and theological views are otherwise hardly in agreement. That cooperation is itself a product of the American tradition of religious liberty which will be nurtured by this bill. We know from our work around the world, and from Jewish history, how rare this sort of inter-religious cooperation is. Even if nothing else were to come from this effort — and with your help we are confident that this bill will be enacted into law — the renewed sense of cooperation between the groups which have helped produce RLPA made this effort worthwhile.

Please lend your sponsorship and full support to the Religious Liberty Protection Act so that we may see the speediest possible enactment of this crucial bill .

Sincerely,



Jack Rosen  
President



Phil Baum  
Executive Director



## Americans for Democratic Action, Inc.

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 ♦ Phone (202) 785-5980 ♦ Fax (202) 785-5969  
 ♦ e-mail: [adaction@ix.netcom.com](mailto:adaction@ix.netcom.com) ♦ Web site: <http://adaction.org>

June 19, 1998

Dear Senator:

Americans for Democratic Action (ADA), which has a long and distinguished history of supporting religious freedom, strongly urges you to co-sponsor the Religious Liberty Protection Act, RLPA (S.2148).

Last June, the Supreme Court made a decision to overturn the Religious Freedom Restoration Act, which required religious exemption from any government action that substantially burdened a citizen's religious exercise unless the government could demonstrate it had a compelling interest to disallow exemption. RLPA would protect religious practice from burdensome governmental interference.

RLPA requires the government to prove a compelling interest if its actions substantially burden the religious practices of individuals and institutions. If, in fact, the government has a compelling interest this law would further insure that its actions only place the most minimal burden on religion. If the government's interests do not serve a compelling interest in the least restrictive manner, then the government would have to accommodate the religious exercise.

RLPA is needed now because government policies sometimes do substantially burden religious practice. For example, certain fire and police stations have a "no beards" rule, which interferes with the religious practice of Muslim firefighters and police officers who wear beards as part of a well-established Muslim tradition.

In most instances the burdens caused by certain government policies could be avoided through limited accommodation. There is, however, no current federal law that forces the government to negotiate these accommodations. RLPA would force these negotiations.

In the interest of our nation's heritage of religious liberty, we ask you to co-sponsor the Religious Liberty Protection Act (RLPA) which would grant every American protection against substantial and unnecessary government burdens on religious practices.

Sincerely,

Amy Isaacs  
 National Director

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*President* Jack Sheinkman ♦ *Chair, National Executive Committee* Bill Markus ♦ *Counsel* Jack Blum  
*Treasurer* Joel Cohen ♦ *Secretary* Ellen Vollinger ♦ *YDA Chair* Jamal Watson ♦ *National Director* Amy Isaacs



June 19, 1998

Dear Senator:

**AMERICANS  
UNITED**  
*for Separation of  
Church and State*

I am writing in support of the Religious Liberty Protection Act (S. 2148). Religious liberty is a cherished feature of American life. It deserves the highest level of judicial protection. Although religious motivation alone should not trump all other legal obligations, governments should not be able to burden religious practice without a compelling justification.

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In 1990 and again in 1997, the Supreme Court substantially weakened religious freedom protections. The Religious Liberty Protection Act is designed to restore the religious liberty rights that were injured by those decisions. The legislation requires government to refrain from placing undue burdens on religious freedom, and is supported by a broad coalition of religious and civil liberties organizations representing diverse points on the political spectrum.

It is my hope that you will co-sponsor this important legislation.

Sincerely,

Barry W. Lynn  
Executive Director

Washington, DC Office



STAFF

Director  
JESS N. HORDES

Washington Counsel  
MICHAEL LIEBERMAN

Assistant Director  
STACY BURDETT

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National Director  
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Chair, National  
Executive Committee  
GLEN TOBIAS

Chief Operating Officer  
PETER T. WILLNER

Chair, Washington Affairs  
Committee  
HAROLD GERSHOWITZ

June 19, 1998

Dear Senator,

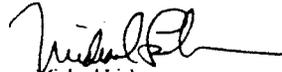
We write to urge you to support the free exercise of religion by cosponsoring the Religious Liberty Protection Act (RLPA), S. 2148, which was introduced in Congress last week. In the aftermath of two recent Supreme Court decisions, Americans' free exercise of religion has been jeopardized. In 1990, in Employment Division vs. Smith, the Supreme Court ruled that government no longer needs a "compelling interest" in order to burden an individual's religious practice. Congress attempted to restore that important balancing test through the enactment of the Religious Freedom Restoration Act (RFRA) in 1993, but in the 1997 case of City of Boerne vs. Flores, the Court held RFRA unconstitutional.

The Religious Liberty Protection Act is carefully drafted based on these Supreme Court decisions defining Congressional authority in this area. The bill will help ensure that Americans do not have to choose between obeying their government and obeying their religious consciences. Religious liberty has always been a basic right enjoyed by all Americans, and a critical principle upon which this country was founded.

We urge you to cosponsor this important measure. Please do not hesitate to contact our office if you need information on this legislation, or if we may be of assistance in any way.

Sincerely,

  
Jess N. Hordes  
Washington Director

  
Michael Lieberman  
Washington Counsel



## ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

"That in all things He might have pre-eminence" Colossians 1:18

U. S. Senator  
The United States Senate  
Washington, DC 20510

June, 1998

### Re: S. 2148—Religious Liberty Protection Act

Dear Senator,

The Association of Christian Schools International (ACSI) is the largest association of evangelical Christian schools in the world. ACSI worked hard to secure the passage of RFRA. With the same vigor we support the **Religious Liberty Protection Act (RLPA)**. This Act will rectify the existing problem that continues to threaten the free exercise of religion in America. The courts have thwarted a religious institution's "free exercise" of its religious distinctives that are enshrined in the First Amendment of the U. S. Constitution.

This First Amendment free exercise problem was intended to be ameliorated by the passage of the Religious Freedom Restoration Act. However, the U. S. Supreme Court struck down the Religious Freedom Restoration Act as applied to state and local laws.

ACSI is pleased to have worked with a broad-based group of civil rights and religious organizations as a member of the "Coalition for the Free Exercise of Religion." The Coalition successfully advocated enactment of the Religious Freedom Restoration Act. The Association of Christian Schools International as a separate entity, and as a member of the Coalition for the Free Exercise of Religion, joins with legislators from both sides of the aisle who truly believe in the American principle of religious liberty for all. ACSI will work tirelessly to see that this important **Religious Liberty Protection Act** is passed by both houses, is signed by the President, and becomes the law of the land.

ACSI encourages you to not only vote for RLPA, but to **become a co-sponsor** of this critically needed legislation.

Respectfully yours,

Dr. John C. Holmes  
ACSI Director of Government Affairs

#### NATIONAL/INTERNATIONAL HEADQUARTERS

MAILING P.O. Box 35087, Colorado Springs, Colorado 80935-3508  
SHIPPING 731 Chapel Hills Drive, Colorado Springs, Colorado 80920-1027  
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#### OFFICE OF GOVERNMENT AFFAIRS

John C. Holmes, Esq. • Director  
1023 15th Street NW, Suite 500 A • Washington, DC 20005-2682  
PHONE 202/789-2637 • FAX 202/642-0382



**BAPTIST  
JOINT  
COMMITTEE**

200 Maryland Avenue, N.E.  
Washington, D.C. 20002-5797

Alliance  
of Baptists

June 20, 1998

American  
Baptist  
Churches  
in the U.S.A.

Dear Senator:

Baptist  
General  
Conference

The Baptist Joint Committee is a 60-year-old agency supported by 11 national Baptist bodies. It seeks to uphold the historic Baptist principles of religious liberty and the separation of church and state.

Cooperative  
Baptist  
Fellowship

As such, we opposed the "Religious Freedom Amendment" offered in the House by Mr. Istook because it would have harmed religious liberty. However, we enthusiastically endorse the Religious Liberty Protection Act (RLPA), S. 2148 and H.R. 4019, which will work to *protect* religious freedom.

National  
Baptist  
Convention  
of America

Unless it can demonstrate a compelling interest, government should not burden the exercise of religion. In fact, it is often obliged to accommodate religion.

National  
Baptist  
Convention  
U.S.A. Inc.

We urge you to join Sens. Hatch and Kennedy and Reps. Canady and Nadler as a co-sponsor of this very important legislation.

Yours very truly,

National  
Missionary  
Baptist  
Convention

J. Brent Walker  
General Counsel

Melissa Rogers  
Associate General Counsel

North  
American  
Baptist  
Conference

Progressive  
National  
Baptist  
Convention  
Inc.

Religious  
Liberty  
Council

Seventh Day  
Baptist  
General  
Conference

Baptist state  
conventions  
and  
churches

## B ' N A I B ' R I T H

TOMMY P. BAER, INTERNATIONAL PRESIDENT

Dear Senator:

B'nai B'rith welcomes the introduction of S. 2148 and H.R. 4019, the Religious Liberty Protection Act (RLPA), and urges Senators and Members of Congress to support this important legislation.

Although religion is alive and well in America, there remains a need to ensure that government does not interfere with individuals expressing their religious beliefs in a nonthreatening manner. Onerous zoning regulations should not target religious communities, employers should not prevent nonproselytizing employees from wearing or displaying religious paraphernalia, and clergy should not be prosecuted for declining to violate the confidence of the confessional to turn state's evidence against confessors.

The scope of RLPA varies from the Religious Freedom Restoration Act of 1993 (RFRA). As you know, RFRA was enacted in the wake of the 1990 Supreme Court decision in Oregon v. Smith, which found constitutional any burdening of religious expression, so long as there was simply a rational basis. Regrettably, the Court overturned RFRA last year in City of Boerne v. Flores, holding that Congress had exceeded its authority. Accordingly, RLPA's scope focuses instead on areas within the federal government's broad interstate commerce and spending powers.

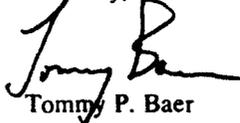
This legislation will subject those laws and regulations that latently or knowingly harm the free exercise of religion to strict scrutiny. It guarantees that religious expression again enjoys the supreme level of constitutional security.

Accordingly, B'nai B'rith has proudly joined Senators Hatch and Kennedy, Representatives Canady and Nadler, and more than 80 other religious and civil liberties groups in supporting RLPA and hope that you will cosponsor this important legislation.

Thank you for your consideration. Should you need additional information, please do not hesitate to contact Jason Epstein, Assistant Director of B'nai B'rith's Center for Public Policy, at (202) 857-6613.

With best wishes,

Sincerely,



Tommy P. Baer



**Christian  
Legal  
Society**

**John R. Wylie**  
Colorado Springs, CO  
President and  
Chairman of the  
Board of Directors

**Brent L. Amato**  
Elgin, IL  
Past President

**Richard B. Couser**  
Concord, NH  
President-Elect

**Wallace L. Larson**  
Phoenix, AZ  
Secretary

**William D. Treeby**  
New Orleans, LA  
Treasurer

**Samuel B. Casey**  
Annandale, VA  
Executive Director and  
Chief Executive Officer

Doing  
Justice  
with the  
Love  
of God

4208 Evergreen Lane  
Suite 222

Annandale, Virginia  
22003-3264  
703/642-1070

Fax: 703/642-1075

[clsHQ@mindspring.com](mailto:clsHQ@mindspring.com)  
<http://www.elsnet.com>

June 19, 1998

**RE: Religious Liberty Protection Act (RLPA: S. 2148; H.R. 4019)**

Dear Senator:

The 4,000 member attorneys and law students nationwide of the Christian Legal Society believe that religious freedom needs federal protection and urge you to co-sponsor legislation to defend religious liberty in this session.

CLS actively participated in the drafting of the Religious Liberty Protection Act ("RLPA") by a national coalition together with Mr. Canady. We have testified before the Congress regarding the need for such a bill. We have filed *amicus curiae* briefs in most religious freedom cases on appeal in the past two decades, and we closely monitor the state of our First Freedom.

The undersigned also serves as co-chair of the coalition's task force promoting passage of similar religious legislation in each state; thus, we are painfully aware of the need for uniform relief at the federal level. Only a handful of states will pass such bills due to opposition from those who believe that the religious needs of some Americans (e.g., inmates) should be denied legal protection.

Based on this experience, CLS is convinced that RLPA would be a constitutionally valid and much-needed remedy to a serious, nationwide problem. The Supreme Court's decisions in 1990 and 1997 (Smith and Flores) deprived Americans of the meaningful protection for the free exercise of religion that they enjoyed under the First Amendment and the Religious Freedom Restoration Act of 1993. Those decisions, however, do not prevent (indeed Smith invites) Congressional action.

RLPA has been carefully drafted by leading legal scholars and practitioners in this field to comport with Congressional power to regulate commerce and to condition the use of federal funds.

Christian Legal Society urges you to use every power and means at your disposal to restore the strictest scrutiny to government burdens on religion. Moreover, we implore you to resist all political temptations toward exempting any person (especially prisoners) from the bill's protection. Religious liberty is an "unalienable right"; once alienated from any class of persons or claims, it will soon be stripped from others as well. Our coalition stands firmly and unanimously opposed to any exemptions.

Thank you for your considering our request to support legislation that would restore uniform, meaningful legal protection to our First Freedom

Very truly yours,

CHRISTIAN LEGAL SOCIETY

Steven T. McFarland, Esq., Director  
Center for Law and Religious Freedom

## COUNCIL ON RELIGIOUS

*Freedom*

June 22, 1998

United States Senate  
Washington, D.C. 20515

**RE: Co-Sponsorship of the Religious Liberty Protection Act - S. 2148**

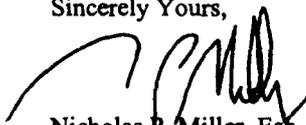
Dear Senator,

I am writing this to request that you become a co-sponsor of the Religious Liberty Protection Act (RLPA). This bill was introduced into the House and Senate on June 9, 1998, with Senators Orrin Hatch and Edward Kennedy as the primary sponsors. The Council on Religious Freedom is part of the Coalition for the Free Exercise of Religion, seventy religious and civil rights groups supporting RLPA. The Coalition believes that the RLPA is necessary because of the recent invalidation of the Religious Freedom Restoration Act (RFRA) by the U.S. Supreme Court.

We believe that the RLPA has been carefully drafted to take into account the concerns expressed by the Supreme Court in dealing with RFRA. Because of that decision, churches have been ejected from certain neighborhoods, church soup kitchens and welfare programs have been closed, and prisoners have been denied basic rights to worship. We believe that the RLPA is necessary to prevent these hardships and to stop government invasions of the religious realm.

We thank you in advance for your support of religious freedom, and hope you can see your way clear to becoming a co-sponsor of the Religious Liberty Protection Act. The Council is an active member of the Coalition for the Free Exercise of Religion, and participated closely in the actual drafting of RLPA. We would be happy to assist you or your office in any way we can in supporting this crucial legislation.

Sincerely Yours,



Nicholas P. Miller, Esq.  
Executive Director

# Coalition for the Free Exercise of Religion

200 Maryland Ave., NE • Washington, DC 20002 • (202) 544-4226 • (202) 544-2094 fax • [bjcpa@bjcpa.org](mailto:bjcpa@bjcpa.org)

Agudath Israel of America  
 The Alphan Institute  
 American Baptist Churches USA  
 American Civil Liberties Union  
 American Conference on Religious Movements  
 American Ethical Union, Washington Ethical Action Office  
 American Humanist Association  
 American Jewish Committee  
 American Jewish Congress  
 American Muslim Council  
 Americans for Democratic Action  
 Americans for Religious Liberty  
 Americans United for Separation of Church & State  
 Anti-Delamation League  
 Association of Christian Schools International  
 Association on American Indian Affairs  
 Baptist Joint Committee on Public Affairs  
 B'nai B'rith  
 Central Conference of American Rabbis  
 Christian Church (Disciples of Christ)  
 Christian Legal Society  
 Christian Science Committee on Publication  
 Church of the Brethren  
 Church of Jesus Christ of Latter-day Saints  
 Church of Scientology International  
 Coalition for Christian Colleges and Universities  
 Coalitions for America  
 Council of Jewish Federations  
 Council on Religious Freedom  
 Council on Spiritual Practices  
 Criminal Justice Policy Foundation  
 Episcopal Church  
 Ethics & Religious Liberty Commission of the  
 Southern Baptist Convention  
 Evangelical Lutheran Church in America  
 Friends Committee on National Legislation  
 General Conference of Seventh-day Adventists  
 Guru Gobind Singh Foundation  
 Hadassah, the Women's Zionist Organization of America, Inc.  
 Interfaith Religious Liberty Foundation  
 International Association of Jewish Lawyers and Jurists  
 International Institute for Religious Freedom  
 Japanese American Citizens League  
 Jewish Council for Public Affairs  
 The Jewish Policy Center  
 The Jewish Reconstructionist Federation  
 Justice Fellowship  
 Liberty Counsel  
 Mennonite Central Committee U.S.  
 Muslim Prison Foundation  
 Muslim Public Affairs Council  
 Mystic Temple of Light, Inc.  
 NAYAMAT USA  
 National Association for the Advancement of Colored People  
 National Association of Evangelicals  
 National Campaign for a Peace Tax Fund  
 National Committee for Public Education and Religious Liberty  
 National Council of Churches of Christ in the USA  
 National Council of Jewish Women  
 National Council on Islamic Affairs  
 National Jewish Coalition  
 National Jewish Commission on Law and Public Affairs  
 National Native American Prisoner's Rights Advocacy Coalition  
 National Sikh Center  
 Native American Church of North America  
 Native American Rights Fund  
 Native American Spirit Correction Project  
 Navajo Nation Corrections Project  
 North American Council For Muslim Women  
 People For the American Way Action Fund  
 Payote Way Church of God  
 Presbyterian Church (USA), Washington Office  
 Rabbinical Council of America  
 Religious Liberty Foundation  
 Sacred Sites Inter-faith Alliance  
 Soka Gakkai International-USA  
 Union of American Hebrew Congregations  
 Union of Orthodox Jewish Congregations of America  
 Unitarian Universalist Association of Congregations  
 United Church of Christ, Office for Church in Society  
 United Methodist Church, Board of Church & Society  
 United Synagogue of Conservative Judaism  
 Women of Reform Judaism, Federation of Temple Sisterhoods

## MEMORANDUM

To: Members of The Congress  
 From: Coalition For The Free Exercise Of Religion  
 Date: June 5, 1998  
 Re: The Need For The Religious Liberty Protection Act

Religious liberty in the U.S. lacks adequate legal protection, due to two Supreme Court decisions discussed below. As the first freedom guaranteed in the First Amendment, religious liberty should be fully enjoyed by all Americans, regardless of their state of residence. Therefore, a coalition of over 80 religious faith groups and civil rights organizations seeks federal legislation that would require religious exemptions from certain state and local laws that substantially burden religious exercise except where the government proves it has a compelling reason to deny them.

### I. Why Congressional Action Is Needed

a. *The Law Before Smith.* Prior to 1990, courts generally interpreted the Constitution to forbid the government from burdening religion except in the most exceptional circumstances: when the state could demonstrate that the action furthered a compelling state interest, and that the government's goal could not be achieved in some other way that didn't interfere with religious practice.

For example, a city ordinance designating a church building as a city landmark meant that the church could not alter its own property without approval by the city landmark preservation board; this substantially burdened the church's religious freedom. Whenever courts found such a "free exercise" burden, they generally required that the government (the city, in this example) give the religious person or body (here, the landmarked church) an exemption from the law, relieving it of the burden.

The only exception to this rule of religious exemptions was where the government could prove that denying religious exemptions was the least restrictive means of furthering a compelling government interest. In this example, the city would have to prove that architectural preservation is a vitally important role of the government and that there is no less onerous way to further this interest than to deny religious

exemptions. In landmark preservation cases, cities often could not meet this standard; in contrast, when churches sought exemption from fire and safety regulations applicable to their buildings, cities routinely won.

b. **The *Smith* Turnabout.** In 1990, to the dismay of Americans of virtually all faiths, the U.S. Supreme Court unexpectedly abandoned the "compelling interest" test for most Free Exercise claims. In *Employment Division v. Smith*, the court held that a law burdening religion would pass constitutional muster if the government could merely show that the law was neutral toward religion, that it did not single out religion for adverse treatment, but rather was generally applicable to all persons and groups. So if a state categorically bans the consumption of alcohol by minors in public places, children seeking to take part in the Catholic mass would no longer have a basis for an exemption under the Free Exercise of Religion clause of the First Amendment.

c. **Congress' Remedy in 1993.** This 1990 turnabout by the Court so threatened religious liberty for all faiths that a national coalition of over 65 religious denominations and civil rights groups coalesced. They drafted and the Congress eventually passed (almost unanimously) a federal statute that restored the "compelling interest/least restrictive means" test nationwide: the Religious Freedom Restoration Act of 1993. RFRA requires a religious exemption from any government action that substantially burdens the complainant's religious exercise, unless the government can prove a "no exemption" policy is essential to a compelling interest.

d. **The Court Strikes RFRA.** However, on June 25, 1997, the Supreme Court held that RFRA could not be applied against state or local law, that it unconstitutionally exceeded Congress' authority and infringed on states' rights (*City of Boerne v. Flores*). [While the high court has not addressed the issue, most scholars and appeals courts (as well as the Clinton Administration) agree that RFRA still applies against federal law or action.]

In sum, religious liberty today has no meaningful federal statutory protection against state or municipal law, policy or practice. And the First Amendment Free Exercise clause is only triggered in the rare case where the state action burdens religious practice only (e.g., a law that prohibits public alcohol consumption by minors in religious rituals).

## 2. What RLPA Can Do To Restore Religious Liberty Protection

The Religious Liberty Protection Act would restore the general rule that state or local officials may not substantially burden religious exercise. It would extend the "compelling government interest/least restrictive means" test to any religious practice that is in or affects commerce among the States, or any state or local program receiving federal financial assistance. Because Congress' authority over the states is limited, those state or local laws or programs that do not affect commerce or receive federal help are beyond the reach of RLPA's protection. RLPA would not apply to private citizens or nongovernmental organizations, nor would it authorize government to regulate them.

RLPA also expressly forbids jurisdictions from banning churches or otherwise imposing land use regulations that burden religious exercise.

The bill would not dictate policy to the States. A State may choose its own means of eliminating substantial burdens on religious exercise. Neither would RLPA affect the current law regarding funding of religious organizations and activities or the First Amendment's ban on government establishment of religion.

Finally, RLPA affords universal protection. As an inalienable right, religious liberty should not be denied to any class of persons. And once a law leaves out one politically unpopular group it will be all too easy to exempt others as well. RLPA protects all Americans of all faiths.

## Coalition for the Free Exercise of Religion

200 Maryland Ave., NE • Washington, DC 20002 • (202) 544-4226 • (202) 544-2094 fax • [bjcpa@bjcpa.org](mailto:bjcpa@bjcpa.org)

Agudath Israel of America  
 The Aleph Institute  
 American Baptist Churches USA  
 American Civil Liberties Union  
 American Conference on Religious Movements  
 American Ethical Union, Washington Ethical Action Office  
 American Humanist Association  
 American Jewish Committee  
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 American Muslim Council  
 Americans for Democratic Action  
 Americans for Religious Liberty  
 Americans United for Separation of Church & State  
 Anti-Defamation League  
 Association of Christian Schools International  
 Association on American Indian Affairs  
 Baptist Joint Committee on Public Affairs  
 B'nai B'rith  
 Central Conference of American Rabbits  
 Christian Church (Disciples of Christ)  
 Christian Legal Society  
 Christian Science Committee on Publication  
 Church of the Brethren  
 Church of Jesus Christ of Latter-day Saints  
 Church of Scientology International  
 Coalition for Christian Colleges and Universities  
 Coalitions for America  
 Council of Jewish Federations  
 Council on Religious Freedom  
 Council on Spiritual Practices  
 Criminal Justice Policy Foundation  
 Episcopal Church  
 Ethics & Religious Liberty Commission of the  
 Southern Baptist Convention  
 Evangelical Lutheran Church in America  
 Friends Committee on National Legislation  
 General Conference of Seventh-day Adventists  
 Guru Gobind Singh Foundation  
 Hadasass, the Women's Zionist Organization of America, Inc.  
 Interfaith Religious Liberty Foundation  
 International Association of Jewish Lawyers and Jurists  
 International Institute for Religious Freedom  
 Japanese American Citizens League  
 Jewish Council for Public Affairs  
 The Jewish Policy Center  
 The Jewish Reconstructionist Federation  
 Justice Fellowship  
 Liberty Counsel  
 Mennonite Central Committee U.S.  
 Muslim Prison Foundation  
 Muslim Public Affairs Council  
 Mystic Temple of Light, Inc.  
 NA'AMAT USA  
 National Association for the Advancement of Colored People  
 National Association of Evangelicals  
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 National Council of Jewish Women  
 National Council on Islamic Affairs  
 National Jewish Coalition  
 National Jewish Commission on Law and Public Affairs  
 National Native American Prisoners' Rights Advocacy Coalition  
 National Sikh Center  
 Native American Church of North America  
 Native American Rights Fund  
 Native American Spirit Correction Project  
 Navajo Nation Corrections Project  
 North American Council For Muslim Women  
 People For the American Way Action Fund  
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 Presbyterian Church (USA), Washington Office  
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 Union of American Hebrew Congregations  
 Union of Orthodox Jewish Congregations of America  
 Unitarian Universalist Association of Congregations  
 United Church of Christ, Office for Church in Society  
 United Methodist Church, Board of Church & Society  
 United Synagogue of Conservative Judaism  
 Women of Reform Judaism, Federation of Temple Sisterhoods

June 20, 1998

Dear Senator:

The Coalition for the Free Exercise of Religion-- comprised of a diverse array of religious and civil liberties organizations (listed at left)--is proud to endorse the Religious Liberty Protection Act (RLPA), S. 2148, originally co-sponsored by Sens. Hatch and Kennedy, and H.R. 4019, sponsored by Reps. Canady and Nadler.

Given our country's cherished heritage of religious liberty, we firmly believe that every American deserves protection against substantial and unnecessary government burdens on the exercise of religion. The members of this Coalition disagreed over the Religious Freedom Amendment offered by Mr. Istook in the House two weeks ago. However, we are united in our support for the Religious Liberty Protection Act.

We urge you to co-sponsor this very important piece of legislation. If you would like additional information about S. 2148, please call us or any member of the Coalition.

We look forward to your prompt sponsorship of this bill. Thank you for your help.

Yours very truly,



J. Brent Walker, General Counsel  
 Baptist Joint Committee on Public Affairs



Oliver S. Thomas, Special Counsel on Religious Liberty  
 National Council of Churches of Christ in the U.S.A.



245 SECOND STREET, NE  
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20002-5795 USA  
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UPDATE MESSAGE (202)547-4343 • <http://www.fcni.org/pub/fcni> • E-MAIL [fcni@fcni.org](mailto:fcni@fcni.org)  
FRIENDS COMMITTEE ON NATIONAL LEGISLATION

18 June 1998

Dear Senator:

I am writing to express the support of the Friends Committee on National Legislation (Quakers) for the Religious Liberty Protection Act of 1998 (S 2148).

The Friends Committee on National Legislation (FCNL) supports the vigorous and diligent protection of all the rights and freedoms guaranteed by the U.S. Constitution, including the free exercise of religion. We believe that government should not be permitted to burden, without compelling reason, religious belief or practice. In those instances where a compelling interest exists, the course of action chosen by government should be the one which places the most minimal burden on religion. Safeguards are especially important to protect the free exercise of those persons who belong to minority faith communities.

FCNL believes that the compelling interest test, established by the Religious Liberty Protection Act and set forth in earlier federal court rulings, is a workable test for striking a sensible balance between religious liberty and competing governmental interests in a broad variety of settings, including schools, the workplace, and prisons.

On behalf of the Friends Committee on National Legislation, I urge you to protect the free exercise of religion for all in the United States by cosponsoring S 2148 and supporting this important measure as it moves through the legislative process.

Sincerely,

Florence C. Kimball  
Legislative Education Secretary

**Margaret R. Hummon:** Clerk  
**Joe Volk:** Executive Secretary  
**Kathy Guthrie:** Field Program Secretary

**Binford Farlow:** Assistant Clerk.  
**Florence C. Kimball:** Legislative Education Secretary  
**Portia Wenzel-Danley:** Director for Administration  
**Arthur Meyer Boyd:** Development and Program Interpretation Secretary

**Edward F. Snyder:** Executive Secretary Emeritus  
**Ned Stowe:** Legislative Secretary  
**Mike Cullinan:** Manager of Accounts





**RICHARD STONE**  
*Chairman*

**NATHAN J. DIAMENT**  
*Director*

**BETTY EHRENBERG**  
*Director of International  
and Communal Affairs*

June 18, 1998

Dear Member of Congress:

On behalf of the Union of Orthodox Jewish Congregations of America – the nation's largest Orthodox Jewish umbrella organization now celebrating its centennial year – I write to ask you to join in supporting the cause of religious freedom in our society by supporting the recently introduced Religious Liberty Protection Act.

This legislation, sponsored by a bipartisan group of senators and representatives and by a broad coalition of religious communities, seeks to redress the severe blows dealt to our nation's "first freedom" by the Supreme Court in recent years. In handing down its ruling in *Employment Division vs. Smith* and then striking down the Religious Freedom Restoration Act last year, the Court has essentially read the Free Exercise Clause out of our Constitution.

Under current law, a state or local government may pass a law or regulation that interferes with a citizen's ability to practice his or her religion with little justification. "RLPA" will require a government to demonstrate that any religion burdening law is pursuant to a compelling interest and is the means of addressing that interest is the least burdensome to religious practice.

This legislation is carefully crafted and constitutional. We ask you to support religious freedom in America by becoming a co-sponsor with Senators Hatch and Kennedy and Representative Canaday and Nadler.

Thank you for your consideration.

Sincerely,

Nathan J. Diament





June 17, 1998

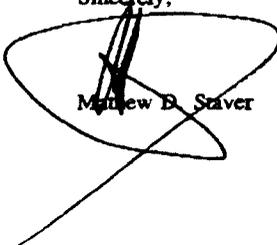
Dear Senator :

Liberty Counsel is a nonprofit religious civil liberties education and legal defense organization. We provide pro bono legal representation to people all across America to defend their religious freedom. It was with great disappointment that we read the United States Supreme Court's decision in *City of Boerne v. Flores* in which the Court declared the Religious Freedom Restoration Act to be unconstitutional. Without this law, people's rights have suffered dramatically.

To strengthen the protection for religious freedom, a bill titled the Religious Liberty Protection Act, HB 4019, has been introduced by Representative Charles Canady. Liberty Counsel fully supports this bill and we respectfully request that you support it as well.

Thank you for your time and attention to this matter. Please do all you can to support the Religious Liberty Protection Act.

Sincerely,



Matthew B. Staver

MDS:mje



Office for Governmental Affairs  
June 19, 1998

**Re: S. 2148 -- Religious Liberty Protection Act**

Dear Senator:

The National Association of Evangelicals, which serves a constituency of 25 million, respectfully urges enactment *this session* of the Religious Liberty Protection Act (S 2148).

In 1990 the Supreme Court, in *Employment Division v. Smith*, gutted the Free Exercise Clause. Congress attempted to remedy that egregious decision by passing, almost unanimously, the Religious Freedom Restoration Act of 1993. The Supreme Court struck again, this time holding in *City of Boerne v. Flores* that Congress exceeded its power under section 5 of the Fourteenth Amendment in enacting the RFRA. But the Court did not rule out other constitutional approaches to protect religious liberty.

The Religious Liberty Protection Act has been carefully drafted to rest upon the commerce power, the spending power, and section 5 of the Fourteenth Amendment. This is a wise course of action. Congress must not abandon the cause of religious liberty.

For Congress to use every constitutional means available to secure the right of the people to religious freedom would demonstrate the highest reverence for religion. The people -- especially those adherents of minority or unpopular religions -- look to Congress for protection from the sometimes heavy hand of government.

We urge you not just to vote for passage of the Religious Liberty Protection Act, but to become a co-sponsor.

Respectfully,

Forest D. Montgomery, Counsel  
Office for Governmental Affairs

FDM:jdk

Dr. Robert P. Dugan, Jr.  
Vice President  
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Web Site: www.nae.net

Don Argue, Ed.D.  
President



NATIONAL  
CAMPAIGN  
FOR A PEACE  
TAX FUND

FOR THE SAKE OF CONSCIENCE

June 22, 1998

Dear Senator,

We strongly urge you to support the **Religious Liberty Protection Act, S-2148** because...

- As those who came to this country seeking religious freedom framed the constitution, they laid out and underscored the First Freedom: to secure their basic liberty to live by their religious teachings.
- You in the Congress, by nearly unanimous vote, reaffirmed the First Freedom in the Religious Freedom Restoration Act of 1993. You did not thus create a new right, but enforced a right with firm roots in constitutional text and history.
- We, the National Campaign for a Peace Tax Fund, have joined the remarkably diverse Coalition for the Free Exercise of Religion. This broad-based coalition represents Christians, Jews, Muslims, Native Americans and Sikhs and reflects a wide range of theological and political views. All joined in the cause of a reparation of religious liberties lost in the Supreme Court's *Smith* decision.
- While groups and individuals in the Coalition take differing views on a religious freedom amendment to the constitution, all join to urge passage of the Religious Liberty Protection Act (RLPA). Please support it.
- RLPA does not protect all that Congress intended in the Religious Freedom Restoration Act, but safeguards some minimums. Therefore, we hope for unanimous support of RLPA.

The National Campaign for a Peace Tax Fund would also like at a later date to discuss with you an accommodation to the claims of the historically recognized unique status of conscientious objection. In view of the fundamental moral basis of their appeal, we ask consideration for these citizens whose religious teachings forbid *any* participation in war, and who seek relief from having their homes, automobiles and other property seized. They ask simply to be allowed to pay their full tax liability without violating their religious beliefs.

We want to reiterate our gratitude for your support of the Religious Freedom Restoration Act, and urge your support of the Religious Liberty Protection Act. Please call on us if we can be helpful in any way.

Sincerely,

Marian Franz  
Executive Director

2121 Decatur Place NW  
Washington, DC 20008-1923

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Email:  
peacetaxfund@ipc.org

Website:  
www.nonviolence.org/peacetax

Endorsing Organizations:

American Friends Service Committee  
Baptist Peace Fellowship of North America  
Brethren in Christ Church  
Buddhist Peace Fellowship  
Christian Church (Disciples of Christ)  
Church of the Brethren  
Episcopal Peace Fellowship  
Evangelists for Social Action  
Fellowship of Reconciliation  
Franciscan Federation of Brothers and Sisters of the U.S.

Friends Committee on National Legislation

Friends United Meeting  
Fund for Peace

General Conference Mennonite Church

Jewish Peace Fellowship

Leadership Conference of Women Religious

Lutheran Peace Fellowship

Mennonite Central Committee

Mennonite Church

National Assembly of Priests' Councils

National Council of Churches

National Jobs with Peace Campaign

NETWORK: A National Catholic Social

Justice Lobby

New Call to Peacemaking

Pax Christi U.S.A.

Presbyterian Church U.S.A.

Sopomans

Unitarian Universalist Association

United Church of Christ

United Methodist General Board of

Church and Society

Veterans for Peace

War Resisters League

Women's International League for

Peace and Freedom

Women Strike for Peace



National Council  
of Jewish Women

NCJW

June 19, 1998

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*President*

Susan Katz  
*Executive Director*

Felicia Anchor  
Nashville, TN  
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Marilyn Flanzbaum  
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ncjw@hum.huji.ac.il

Dear Senator:

On behalf of the 90,000 members of the National Council of Jewish Women (NCJW), I am writing to urge you to become a co-sponsor of the Religious Liberty Protection Act of 1998 (RLPA).

As a legislator, it is important for you to take crucial steps in the wake of the Supreme Court decision which overturned the Religious Freedom Restoration Act (RFRA) last summer. RLPA, supported by a bi-partisan coalition of Senators and Representatives and a diverse coalition of religious and civil rights organizations will help to restore the religious liberties we have historically enjoyed in this country.

NCJW has long believed that religious liberty is a principle that must be protected and upheld. By supporting this legislation, you are helping to ensure that this principle will always be a fundamental right.

The National Council of Jewish Women is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all.

We look forward to working with you and your staff on this issue in the future.

Sincerely,

*Nan Rich*

Nan Rich  
National President



Office of Governmental Relations  
 110 Maryland Avenue NE  
 Washington, DC 20002  
 Phone 202 544 3400  
 Fax 202 544 0277

Dear Senator,

June 22, 1998

On behalf of National Ministries, American Baptist Churches in the U.S.A., I write to express our support for the Religious Liberty Protection Act (S ~~2448~~ <sup>2148</sup>), and to encourage you to co-sponsor this important legislation.

American Baptists understand religious liberty to be fundamental to human freedom, a gift of God without which the essential character of human life is violated. Religious liberty is not a privilege which may be granted or denied by government, rather, it is a right and an obligation required of government. Absent religious liberty all other human rights are in danger of being subverted or abused.

American Baptists also understand that among the roles and responsibilities of government are the maintenance of social order, the promotion of the general welfare, and the protection of citizens and their rights. Therefore, government can claim a "compelling interest" in the conduct of religious institutions, in such matters as health and safety, within the bonds of the First Amendment. Given the nature of religious liberty, however, we believe government may only do so if it is able to demonstrate a compelling interest and that the means by which it advances that interest is the least restrictive to the free exercise of religion.

The Religious Liberty Protection Act seeks to protect religious practice from burdensome and unnecessary governmental interference by restoring the compelling interest test to free exercise jurisprudence. The Religious Liberty Protection Act would restore the general rule that government may not substantially burden religious exercise unless government demonstrates that application of the burden furthers a compelling interest, and is the least restrictive means of furthering that interest.

We support the restoration of the compelling interest test as expressed in the Religious Liberty Protection Act, and encourage you to support this legislation. Thank you for your consideration of these concerns.

Sincerely,

Curtis Ramsey-Lucas  
 Director of Legislative Advocacy

National Ministries   
 American Baptist Churches USA  
 P.O. Box 851 - Valley Forge, PA 19482-0851  
 Phone 610.768.2000 - Fax 610.768.2470  
 1.800.ABC.3USA

# OFFICE FOR CHURCH IN SOCIETY • UNITED CHURCH OF CHRIST

110 MARYLAND AVENUE, N.E., SUITE 207 • WASHINGTON, D.C. 20002 • (202) 543-1517

June 19, 1998

Dear Senator:

We urge you to become a co-sponsor of S.2148/H.R. 4019, the Religious Liberty Protection Act.

We were outraged when the Supreme Court, in its Smith decision, struck down the "compelling governmental interest" and "least restrictive means" standards that had defined free exercise of religion explicitly for a generation and implicitly much longer. The Supreme Court has not put a new standard in its place which offers real Constitutional protection for religious liberty, and we regard this as unacceptable.

If you have not read Sandra Day O'Connor's dissent in this case and want a brief explanation of this issue, we highly recommend it.

The United Church of Christ invested much energy in passing the Religious Freedom Restoration Act, to offer legislative protection where Constitutional protection had been made vacuous. Hence, we were disappointed when the Court struck that down.

We are now delighted that our effort, through the Coalition for the Free Exercise of Religion, has been successful in drafting a more limited legislative solution which will restore legislative protection.

Your co-sponsorship will mean much to those of us who value the First Amendment freedom of religion. We regard freedom of religion as a fundamental and universal human right, and agree with the words in stone at the FDR memorial that this is one of the four basic freedoms.

Please help us put these words back into law, as well as stone.

Sincerely,



The Rev. Jay Lintner  
Director, Washington Office

THAT THEY MAY ALL BE ONE

700 PROSPECT AVENUE • CLEVELAND, OH 44115 • (216) 736-2174

WALLACE H. RYAN KUROIWA EXECUTIVE DIRECTOR DOLLIE B. BURWELL CHAIRPERSON





June 18, 1998

Dear Senator,

On behalf of the more than 300,000 members of People for the American Way, we urge you to co-sponsor and actively support the Religious Liberty Protection Act (RLPA), S.2148.

This bill has solid bipartisan support. Recently, Judiciary Committee Chairman Hatch (R-UT) and Ranking Democrat Senator Kennedy (D-MA) jointly introduced the bill in the Senate. They were joined by Representatives Canady (R-FL) and Nadler (D-NY) who jointly introduced the bill, H.R. 4019, in the House. This bill has bipartisan support because it protects a basic right—the free exercise of religion. It strengthens Americans' ability to practice their religious beliefs free from undue government interference.

This bill restores the legal protections governing religious practices that existed before 1990, when the Supreme Court overturned longstanding law in its Employment Division v. Smith decision. Prior to Smith, state and local government entities were prohibited from substantially burdening the religious practices of Americans absent a showing of a compelling government interest. RLPA returns the law to that sensible standard. Once a claimant shows that a law is a prima facie violation of the Free Exercise clause, in order for the law to stand, the government would have to demonstrate the law's compelling interest. This process is an appropriate balance between the government's interests and the people's right to freely exercise their religion.

The Coalition for the Free Exercise of Religion supports this bill. This coalition is a large and diverse alliance of more than 80 varied religious groups and civil liberties organizations. Together we and our coalition allies support RLPA because it protects Americans of all faiths. We hope you will join us and support this legislation. We look forward to working with you to pass this legislation.

Sincerely,

Carole Shields  
President

Catherine LeRoy  
Director of Public Policy

**RELIGIOUS ACTION CENTER  
OF REFORM JUDAISM**

June 22, 1998

Dear Senator:

On behalf of the Reform Jewish Movement -- the Union of American Hebrew Congregations, Central Conference of American Rabbis and Women of Reform Judaism -- and their more than 870 congregations, 1800 rabbis, and 1.5 million members, I urge you to co-sponsor the Religious Liberty Protection Act of 1998 (S. 2148) introduced by Senators Orrin Hatch (R-UT) and Edward Kennedy (D-MA). This vital legislation will ensure that the right to free exercise of religion remains a cornerstone of our democracy.

As Jews, we are painfully aware of the danger of governmental restrictions upon religious expression. Our long history of oppression at the hands of societies intolerant of minority religions has taught us the cost of governmental interference with religion.

In sharp contrast, the American experience teaches us the value of religious freedom. We live in the most religiously diverse nation in the history of the world, where more than 2,000 religions, denominations, and sects thrive and co-exist in harmony. As Jews, we rejoice that America -- the golden land of inalienable liberties -- is the nation where all religions, including minority religions, enjoy the most freedoms, the most rights, and the most opportunities in the world.

RLPA is a legislative response to two troubling U.S. Supreme Court decisions -- *Unemployment Division v. Smith* and *City of Boerne v. Flores* -- which have restricted the fundamental American right to the free exercise of religion. By disregarding the time-tested "compelling state interest" standard, the Court has stripped religiously observant Americans of protections long thought to be ensured by the Bill of Rights. RLPA would reaffirm our national commitment to religious expression by ensuring that government may not substantially burden the exercise of religion unless it is acting to advance a compelling interest in the most limited way possible.

The fundamental freedoms enshrined in our nation's Constitution have allowed America's Jews, and other minority faiths, to develop their rich traditions free from majoritarian prejudices. Let us restore to all religions the protection that our Constitution has guaranteed for more than 200 years. If religious freedom is to remain a part of the American fabric, if the spirit of American democracy is to remain intact, then Congress must move quickly to pass the RLPA.

Again, I urge you to co-sponsor the Religious Liberty Protection Act of 1998 (S. 2148).

Sincerely,

  
Mark J. Pelavin,  
Associate Director

*The Religious Action Center  
pursues social justice and  
religious liberty by  
mobilizing the American  
Jewish community and  
serving as its advocate  
in the nation's capital*

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Commission on Social Action  
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*Leonard Fan  
Director  
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of Reform Judaism*

*The Religious Action Center  
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American Rabbis and  
the Union of American  
Hebrew Congregations  
with its affiliates:  
American Conference  
of Cantors,  
Association of Reform  
Zionists of America,  
National Association of  
Temple Administrators,  
National Association of  
Temple Educators,  
National Federation of  
Temple Brotherhoods, NFTB,  
Women of  
Reform Judaism,  
North American Federation  
of Temple Youth*





Soka Gakkai International – USA

June 22, 1998

Dear Senator:

I'm writing on behalf of the 300,000 members of the Soka Gakkai International (SGI) -USA, a lay Buddhist organization, to ask that you sign on as a co-sponsor for SR 2148, the Religious Liberty Protection Act (RLPA), introduced by Senators Hatch and Kennedy.

In the wake of such Supreme Court decisions as *Employment Div. v. Smith* and *City of Boerne v. Flores*, we religious communities find ourselves more vulnerable than ever to the blind enforcement of an increasingly complex web of state and local regulations. In some cases our members' ability to conduct informal study sessions in their homes has been threatened by local zoning ordinances. In other cases, churches have been prevented from growing due to historic landmark regulations. Clearly, some federal statutory protection is needed in order to safeguard our most important freedom – the freedom of belief.

In prohibiting government from placing a substantial burden on religious practices, except where it is the least restrictive means of furthering a compelling state interest, the RPLA restores the level of protection previously accorded religious expression. I believe this is good legislation with a good purpose, and once again ask that you lend your support to this effort.

Established in 1960, the SGI-USA is an association of Buddhist believers, with 66 centers throughout the US. Its peace, cultural and educational activities are based on the long-standing traditions of Buddhist humanism.

Sincerely,

 A handwritten signature in black ink that reads 'Fred M. Zaitou'. The signature is fluid and cursive, with a horizontal line drawn across the top of the letters.
 

Fred M. Zaitou  
SGI-USA General Director



LELAND HOUSE ON CAPITOL HILL  
505 Second Street, N.E.  
Washington, D.C. 20002-4916  
Telephone (202) 547-8105  
FAX (202) 547-8165

June 22, 1998

Dear Senator:

The Ethics & Religious Liberty Commission of the Southern Baptist Convention is pleased to endorse the Religious Liberty Protection Act. We very much appreciate your leadership in responding to the Supreme Court's decision in the *Boerne v. Flores* case which struck down the Religious Freedom Restoration Act. As you are well aware, the Religious Freedom Restoration Act was passed by Congress with barely any dissent. We hope and expect that Congress will fully support the Religious Liberty Protection Act with the same degree of enthusiasm. The intent of this new legislation is the same as that of the old. Religious liberty is due the greatest protection possible. We believe that this act is a good faith effort to respond to the concerns articulated by the Supreme Court in its decision in *Boerne v. Flores*.

We look forward to working with you as we all remain vigilant in our efforts to defend and protect the concept of the free exercise of religion embraced by the original authors of the Bill of Rights. Again, thank you for your vital role of leadership in addressing this matter of grave concern. Please contact us if we may be of any assistance whatsoever.

Sincerely,

Dr. Richard D. Land  
Ethics & Religious Liberty Commission

RDL:lah

## THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

Public Affairs  
National Press Building, Suite 902 • 529 14th Street, N.W.  
Washington, D.C. 20045  
Telephone: (202) 662-7530 • Fax: (202) 662-7538

June 19, 1998

Dear Senator:

The Church of Jesus Christ of Latter-day Saints strongly supports the principles expressed in S. 2148, The Religious Liberty Protection Act of 1998 (RLPA), and urges its passage during the 105th Congress.

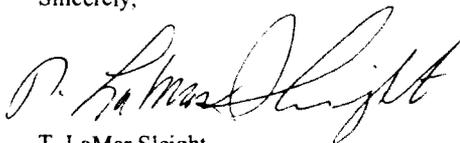
The Church of Jesus Christ of Latter-day Saints also urges you to co-sponsor S. 2148 as a demonstration of your recognition of the importance of the free exercise of religion to all Americans. This bill is sponsored by Senators Orrin Hatch (R-UT) and Ted Kennedy (D-MA) and Representatives Charles Canady (R-FL) and Jerrold Nadler (D-NY). It is supported by a broad representation of religious and civil liberty organizations that represent many ideologies along the political spectrum.

This legislation restores federal statutory protection to religious freedom previously granted under the Religious Freedom Restoration Act. We believe that this statutory re-application of the "compelling governmental interest" standard is both a legitimate and a necessary response by Congress to the degradation of religious freedom resulting from the 1990 Smith and 1997 Boerne cases by the Supreme Court.

For the 10 million members of The Church of Jesus Christ of Latter-day Saints, The Religious Liberty Protection Act of 1998 implements a vital principle of general application embodied in our Church's eleventh Article of Faith, written in 1842: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where or what they may."

We hope that you will become a co-sponsor of S. 2148, The Religious Liberty Protection Act of 1998, and support the passage of this vitally important and timely legislation.

Sincerely,



T. LaMar Sleight  
Director, International  
and Government Affairs

